

EDITED BY PÉTER MOLNÁR

FREE SPEECH

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Edited by
PÉTER MOLNÁR



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Foreword

JOHN SHATTUCK

President and Rector

Central European University

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Free speech is the bedrock of democracy. It supports and gives meaning to three building blocks of an open society.

First is the political principle that individuals and groups have the right to decide how and by whom they should be governed, and to hold accountable those whom they choose as their governors. This requires the freedom to speak, to exchange information and ideas and challenge the ideas of others, particularly those who govern, and to have access to information.

Second is the intellectual principle that truth is neither stable nor fixed, and that much of what was once considered true often turns out to be false. Freedom of speech is necessary to break what John Stuart Mill called the “deep slumber of decided opinions” in order to expose them to open and rigorous examination in the marketplace of ideas.

Third is the cultural principle that human existence is inherently expressive and can be enriched by freedom of expression. Like political dissent, controversial cultural expression often provokes censorship from disapproving authorities or popular majorities. But if expression is to be free and unfettered, speech that offends must be protected. As Evelyn Beatrice Hall wrote in her biography of Voltaire, as an expression of Voltaire’s commitment: “I disapprove of what you say, but I will defend to the death your right to say it.”

These principles have roots in many cultures, but have been hotly contested and often suppressed throughout history. Human civilization is marked universally by the suppression of ideas and expressions that challenge the existing order. With the advent of the printing press, for example, the Catholic Church developed a list of prohibited books in 1559 that went through 300

editions and resulted in centuries of censorship, including the works of some of the world's greatest scientists and philosophers, such as Galileo Galilei, Giordano Bruno, Rene Descartes, John Locke, David Hume and Jean-Jacques Rousseau.

Today, freedom of speech is recognized as a universal human right. Article 19 of the International Covenant on Civil and Political Rights provides: "Everyone shall have the right to freedom of expression; this right shall include freedom to speak, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, or in writing or in print, in the form of art, or through any other media of choice."

But even as it is exercised more widely, the right to free speech faces more challenges than ever. With the rapid increase in information and communications technology, both the media of expression and the means of suppression have become more powerful and more diverse than at any time in history. Narratives of free speech differ across the world, but all share the same fundamental principles of open society.

This volume of essays illuminates both the differing narratives and the universal principles that underlie them. The editor, Péter Molnár, has assembled authors from five continents and many countries, with diverse viewpoints. Their diversity of views makes this collection of essays especially compelling, going beyond the approach of Western democracies and creating an opportunity for intercultural dialogue on the meaning of freedom of speech in different parts of the globe.

Introduction

PÉTER MOLNÁR

This is a book about free speech narratives. Stories about how imagination and rational thinking in wildly different cultures capture, imagine, and conceptualize what freedom of speech means. 1989 and 2011 are only two recent (in historic perspective) turning points when freedom of speech and freedom of the press emerged, or at least powerful efforts were made to support its emergence, although disheartening backlashes followed in several countries. This book also tells many other free speech narratives that emerged, or evolved outside the frames of 1989 and 2011, also with several troublesome repercussions.

The fall of the Berlin wall in 1989, the year of largely velvet revolutions (in the words of Vaclav Havel), brought freedom of speech to Central Europe and Eastern Europe. It also increased the hope that freedom of speech and democracy can prevail in more and more countries on the earth. This book examines, in some historic perspective, to what extent this hope has become reality since and prior to 1989, also in light of the Arab revolutions of 2011.

Overarching, international analyses (Part I) are followed by the examination of free speech, censorship, and access to information in countries with wildly different cultural environments (Part II). Throughout, access to information is considered as part of free speech. Public discourse cannot be open and meaningful without access to data on public matters, and we cannot fully exercise our free speech rights if our states are not transparent. Thus, chapters on freedom of information are mixed with chapters on freedom of speech.

This book treats the reader not as a tourist, but as a traveler. It does not stop at every famous tourist site that have been the most visited. Instead, it

goes up many side streets. It provides an opportunity for curious people who would like to understand whether free speech can be contextual (and if so in what ways) to take a journey of exploration. It draws a map of the concepts and contexts of free speech in the second decade of the 21st century.

Reborn restrictions to free speech—as have taken place, for example, in some Central European and East European countries, such as the backlash in Hungary that received broad international attention—makes the critical assessments presented in this volume especially timely. Comparative studies must help to avoid such backwards steps and to create enabling environments needed by any culture in order to develop and sustain the spirit and practices of freedom of speech.

Part I: Overviews kicks off the line of diverse chapters with Monroe Price's chapter on 1989, 2011, and strategic narratives, followed by an interview with Frank La Rue, the UN Special Rapporteur on Freedom of Expression, who speaks on improvements and challenges to freedom of speech, based on his broadly international experiences.

Three chapters on Europe follow. Also in an interview chapter, Dunja Mijatović, the Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe (OSCE), assess freedom of speech, freedom of the media, and access to information in the OSCE countries. Miklós Haraszti, the previous OSCE Representative on Freedom of the Media, looks at the diverging landscapes of media freedom in Europe. Next, Dirk Voorhoof comprehensively examines the relevant jurisprudence of the European Court of Human Rights, pointing at some crucial challenges, and especially highlighting some interesting characteristics of the right to freedom of expression and information under the European Human Rights system.

In the first of two chapter on American states, Catalina Botero Marino, the Special Rapporteur for Freedom of Expression for the Inter-American Commission on Human Rights (IACHR), gives a similarly comprehensive account of developments in the countries under her supervision. Toby Mendel provides an overarching analysis of the right to information in Latin America that played the leading role in international recognition of this right. A third interview chapter takes the reader to Africa: Pansy Tlakula, Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples' Rights, reviews freedom of speech, freedom of the press, and freedom of information in Africa.

Four subject-specific chapters close *Part I: Overviews* on two issues of particular importance: The right to information and responses to "hate speech." Helen Darbishire reviews the history of the right of access to information from its beginnings in the enlightenment thinking of the 18th century up to the most recent cases of the European Court of Human Rights. She evaluate some of the key moments that have lead to the recognition of the right of everyone to access information held by public bodies and points to

some of the challenges still remaining. Next, Sandra Coliver provides an overview of a specific, key aspect of access to information. She shows how national freedom of information laws have been covering more and more relevant private bodies while access to information has been expanding on the map with a proliferation of such laws. Two chapters on the most difficult challenge to free speech theory and practice—the issue of “hate speech”—close *Part I: Overviews*. In the first, Sejal Parmar assesses the significance of the Rabat Plan of Action, which she calls a turning point in addressing “hate speech.” In the second, Bernard Rorke offers a provocative account of the freedom to hate Roma in Europe.

Part II: Countries starts with Josep Maria Carbonell and Joan Barata Mir’s analysis of the transition that occurred in the Spanish media at the end of the Franco dictatorship and the subsequent transition to democracy in Spain, with focus on the legal and regulatory aspects. Andrei Richter’s chapter is about a fascinatingly comprehensive Supreme Court resolution on freedom of the media in 21st-century Russia. Then the book takes the reader to Africa again: Ezra Chiloba examines the law and practice of access to information in Kenya in the last decade and Yared Legesse Mengistu takes a cursory look at the Ethiopian media regime. Gilbert T. Andres writes about efforts to expand the contours of free speech in the Philippines amid an environment of impunity against journalists. Rhonda Breit then shows why and in what constitutionally complex sense freedom of speech is fragile in Australia.

The following two authors look at freedom of speech in Asia in the largest dictatorship (in population) and the largest democracy. Mei Ning Yan writes about the promising impact of new media on freedom of speech and the regulatory efforts to sustain state control in China. Sunil Abraham takes us to India, where he focuses on the new types of technological censorship in the world’s largest democracy. The travel continues on to the border of Asia and Europe, to Turkey, with Zeynep Alemdar, who examines the “Turkish model” of free speech. Two chapters look at two Arab countries where changes took place in dramatically different ways: Brenda F. Abdelall analyzes freedom of speech in Egypt at the time of the evolving changes in Egypt and Abderrahim Chalfaouat reviews the state of the media, freedom of expression, and democratization in Morocco.

The next two chapters are in conversation with each other. In the first, Richard N. Winfield and Janine Tien shed light on the unintended consequences of “hate speech” laws in the Danish cartoon controversy, and Asma T. Uddin responds to them while looking at the UN Defamation of Religions Resolution and domestic blasphemy laws in Pakistan. The global free speech journey ends in the Netherlands, with reflections on international law (as several other country chapters do, like the previous chapter by Asma Uddin) that connects the reader back to chapters in *Part I: Overviews*, thus bringing the contributions into full circle. In the final chapter in the book, Jeroen

Temperman writes about the *Wilders* case in the Netherlands, an infamous example of anti-Muslim speech, and its potentially landmark implications for related international law.

I am grateful to the authors for their insightful contributions, to two of my former students at the Central European University, Jennifer Newman who assisted with earlier versions of the entire manuscript, and Margaret Farmer who helped with several chapters, to Pete Nischt, Jennifer's former intern at her law firm, to Renata Seregi, MA student in International Relations, Specialization in Human Rights at ELTE, who made the Index, and to Tamas Gabor Indiana, who designed the book cover, and with whom (in the company of many other slammers and the participating audience) we do slam poetry, a wonderful embodiment of the subject of this book: Freedom of speech.

1989, 2011, and Strategic Narratives

MONROE PRICE¹

I. Introduction

András Sajó once famously said that 1989 was hardly a period of revolutions—it was a period of restorations. The problem for those refashioning Hungary (leaders and society), and other countries in the region, was what era, what combination of history and power, what nomenclature to restore. Like most states, Hungary was, in large part, a collection of stories connected to power: it was shaped by remembered traditions, obligations and laws—all stories in themselves. It could be said that many of the post-1989 struggles resulted from rummaging through elements of the national past and picking which to glorify and venerate. This was probably Sajó's perceptive point.

In the wake of the Arab Spring, trying to make sense of the sequence of events, I have tried to ask how this process of selection occurs: how within the bandwidth of circumstances we might call reality, stories or national identity are refashioned, especially in moments of crisis. Both the Arab Spring and 1989 were times in which viable states fought to manage the process of narrative transformation. As statues toppled and massive portraits were ripped from walls, the phenomenon repeated itself: ideological conversions on a mass scale occurred as national heroes became delegitimated villains, keepers of vaunted ideology became perpetrators of evil, agents of stability became

¹ This chapter is adapted from *Freedom of Expression, Globalism and the New Strategic Communication*, Cambridge University Press, 2014.

vessels for potential protest and disorder. Are there commonalities in decoding these events across decades and across great national variations?

I want to explore this question without making great resulting claims. When protests spread from Tunisia to Egypt and then rapidly beyond, the word “contagion” was often used—an epidemiology of unrest.² Similar language occurred in 1989.³ In a sense, what interests me is the role competing states globally played, if any, in this contagion and in fostering the conditions for contagion. Thinking about the Arab Spring, I wondered about the effect of *strategic narratives*. I define the term quite narrowly to mean (a) externally agreed outcomes—usually by more than one state; (b) that are designed to control outcomes in a conflict or transformative political transition; and (c) where key players within and without the target state conform or are made to pay consequences. What makes it a “narrative” is that it is a forward-looking account. What makes such narratives “strategic” is that it was an account with consequences. In the 1940s, agreement among the post–World War II powers as to spheres of influence and the fate of the Eastern Bloc constituted a tragic strategic narrative. Was this equally true of a subtle consensus after 1989 that led to the post-Soviet transitions?

In the case of the Arab Spring, examining the rhetoric of efforts to hold on—to resist change—by then-incumbent leaders and the press and public reaction to that rhetoric can give us some purchase on these questions. I have looked, for example, at two leading political actors, one Egyptian and one Libyan, as they sought to resist the emerging somewhat orchestrated “plan” for the future of their states. I argued that they crossed a transnationally agreed strategic narrative, each through the vehicle of a speech to a national and global audience, leading in both cases to a hostile reaction—swift and relatively bloodless in the instance of Egypt, and long and costly in the instance of Libya.

When Hosni Mubarak, then still Egypt’s long-reigning authoritarian president, spoke on what turned out to be his last public speech in his official capacity (on 1 February 2011), the international narrative for change was already more or less set. It was widely anticipated that Mubarak would make generous obeisance to the protestors at Tahrir Square, recognize the importance of the rising civil society, speak respectfully of processes of fundamental change, and gracefully announce a purposive set of practices for shuffling

2 Daniel W. Drezner, “Contagion in World Politics,” *Foreign Policy* blogpost, 17 August 2011, http://drezner.foreignpolicy.com/posts/2011/08/17/contagion_in_world_politics.

3 For an excellent review of the “neighborhood effect,” see Dirk Berg-Schlosser, “Neighborhood Effects” of Democratization in Europe.” *Taiwan Journal of Democracy* 4, no. 2 (2008), <http://www.tfd.org.tw/docs/dj0402/029-046%20Dirk%20Berg-Schlosser.pdf>.

off the political stage. Instead, he gave a somewhat angry, defensive speech in which he emphasized ways he would continue to control the levers of power rather than merely summarily disappear. The reaction among the Egyptian military, the protestors in the street, and the international policy world in Europe and the United States was virtually unanimous. Mubarak had blundered badly; he had violated expectations in some fundamental way. Within 24 hours, he was forced to resign.⁴

A few weeks later, Saif Gaddafi, the LSE-educated son of the unpredictable and tyrannical Libyan leader, spoke to the Libyan public (and the world) in the face of growing protests in Benghazi and in Tripoli. Gaddafi, like Mubarak, was expected to give a talk that provided a threshold to transition. It would be a symbol-filled transition, with the old autocratic father leaving and the young son replacing him as heir, serving as a bridge figure to a more modern reformed and democratic state. But Saif's speech, too, was bitterly disappointing to a global audience—shocking many who had felt they knew him and had prepared him for this opportunity to show a bright new way for his country. Unlike Mubarak, neither Saif nor his father was forced from power immediately as a result of the unexpected speech. But the following month, the UN passed a resolution authorizing a no-fly zone and the taking of all necessary steps, including the use of force, to prevent civil deaths in Libya. Not much later, US president Barack Obama, French president Nicolas Sarkozy and British Prime Minister David Cameron signed an extraordinary letter calling for the elder Gaddafi's resignation. The very long and painful process of seeking to enforce what emerged as an internationally agreed upon text for the future of Libya had begun.

What were the equivalents in the 1989 sequence? What was similar—though perhaps only a phenomenon of the surface—was the rush to fill a void: to supply and enforce new narratives of Western democracy, of independence, of potentially stable and economically sustaining futures. But there were also considerable differences. In the Arab Spring, the power of the incumbents was not part of an organized, externally controlled bloc. There was no close equivalent of the Soviet Union seeking to impose rules or establish narratives for the states within its sway—albeit narratives that were frayed, disputed, and differentially imposed and released.⁵ The year 1989 was about the sudden release, the extraordinary weakening, of narratives with consequences. Tanks would not roll in from the East. It would not become a repeat of 1956.

⁴ Compare the last speech of the Romanian leader Nicolae Ceaușescu, which can be viewed at <http://visualcultureblog.com/2010/10/the-lost-camera-in-ceausescus-final-speech/>.

⁵ See, for example, Jacques Lévesque, *The Enigma of 1989: The USSR and the Liberation of Eastern Europe* (Berkeley: University of California Press, 1997).

It will be difficult to determine—in any context and certainly across contexts—the relationship between internal mobilization and energy (“the power of the street” as it was called in 2011) with the nature of external consensus that led to such complex and decisive transformations. In 2011 it could have been that the incapacity of the Gaddafi regime or the then-Egyptian government to put forward a coherent perspective was decisive. What I suggested rather, was that Mubarak and young Gaddafi were violating their roles as players in critical episodes of the Arab Spring as it was being constructed internationally, episodes that were largely designed by non-Libyan leaders, who had the expectation that their wishes as to the playing out of the drama would be followed. Without question, these transforming events were sparked, fueled, and made possible by acts of protests and individual acts of heroism and courage. But the reactions were also examples of the power of “strategic narratives.”

II. Strategic Narratives

The term “strategic narrative” has been resuscitated and burnished in the last several years as a more specific and narrower element of “strategic communication.” These are “frameworks constructed to allow people to make sense of the world, policies, events, and interactions.”⁶ Benjamin O’Loughlin, who has done a great deal to develop the concept, defines strategic narratives as ones “forged by a state with the express purpose of influencing the foreign policy behavior of other actors.”⁷ But forged by which state? Who constructed the framework? If something akin to a strategic narrative had come to exist, and Mubarak and Gaddafi ran afoul of its power, then it is important to understand the narrative’s conditions for operation and its relationship to the general themes of state authority, strategic communication and free expression.

⁶ See Laura Roselle, “Strategic Narratives of War: Fear of Entrapment and Abandonment During Protracted Conflict,” In *APSA 2010 Annual Meeting Paper*, 2010 Available at SSRN: <http://ssrn.com/abstract=1643331>; Murray Edelman, *Constructing the Political Spectacle* (University of Chicago Press, 1988); Lawrence Freedman, *The Transformation of Strategic Affairs*, (IISS/Routeledge 2006), 22; Mary Kaldor, Mary Martin, and Sabine Selchow, “Human Security: A New Strategic Narrative for Europe,” *International Affairs* 83, no. 2 (2007): 273-288;

Andreas Antoniadis, Alister Miskimmon, and Ben O’Loughlin, “Great Power Politics and Strategic Narratives,” In *CGPE Working Paper* Brighton: Centre for Global Political Economy, University of Sussex., 2010, <https://www.sussex.ac.uk/webteam/gateway/file.php?name=cgpe-wp07-antoniades-miskimmon-oloughlin.pdf&site=359>.

⁷ From O’Loughlin website < <http://newpolcom.rhul.ac.uk/npcu-blog/2009/9/28/announcement-strategic-narratives-panels-at-the-2010-isa-ann.html>>

Can one look backwards, from 2011 to 1989, and reinvent the sequence of events through differently educated eyes? I turn to the idea of strategic narratives as a way of doing this.

The existing scholarship helps explain what can be meant by strategic narratives and provides a wider berth in which my particular meaning of the term is situated. Niels Röling and Marleen Maarleveld take a longer view of the function of narratives. They rely on Giddens and his notion of “double hermeneutics” to clarify how stories, images, theories, slogans, and axioms are woven together, become widely shared, and dominate behavior.

Single hermeneutics refers to the act of making sense of objects and events. For example, Copernicus, the 16th-century Polish astronomer, established that the earth is not the center of the universe. Instead, the earth is a rather insignificant planet turning around the sun. Double hermeneutics refers to the fact that sense making by some can affect the sense making and behavior of others. In other words, whether people believe the earth turns around the sun or vice versa does not affect the behavior of these celestial bodies. But the way people make sense of the world can certainly affect the sense making of others.⁸

As Röling and Maarleveld put it, “Widely shared narratives are constructed that influence individual sense making by highlighting and legitimating some options and making invisible others... Strategic narratives shape social relations by determining our expectations about other people’s behavior. Social relations produce structure and structure produces social relations.”⁹ As a result,

Social science can be as powerful as natural science because it can equally affect people’s sense making. It is not the power of its predictions that give social—or any—science its influence, but the extent to which its perspectives or narratives take hold of people’s imagination and enthusiasm, and especially the extent to which that sense making begins to justify policies and shape enduring practices, institutional design, and the use of natural resources and ecological services.¹⁰

⁸ Anthony Giddens, *Social Theory and Modern Sociology* (Cambridge: Polity Press, 1987),

⁹ Niels Röling, and Marleen Maarleveld, “Facing Strategic Narratives: In Which We Argue Interactive Effectiveness,” *Agriculture and Human Values* 16, no. 3 (1999): 297.

¹⁰ *Ibid*, 297.

In this sense, “narrative” must be separated from merely observing the world and recording what is observed. Narrative is interpretive, not merely, or necessarily objective. This potential gap between narrative as myth and narrative as representation of the world is the basis for its strategic significance.

When it comes to those elements that, additionally, make a narrative strategic, Laura Roselle captures a logic that provides significance. Roselle, like O’Loughlin, distinguishes “narratives” from “stories” and discourages using the terms interchangeably.¹¹ Roselle embraces Edelman’s observation that “language usage is strategic. It is always part of a course of action to enable people to live with themselves and with what they do and to marshal support for causes.”¹² “What makes such efforts ‘narratives’ instead of plain ‘stories,’ domestic ‘spin,’ or ‘propaganda’ is the fact that they are less retrospective explanations than they are forward-looking conceptual frameworks for explaining and interpreting events yet to come”¹³ Narratives are different, as well, from “framing” exercises. Narratives “attempt to follow a certain self-referential logic which must string together a host of events, pose a causal relationship between them, and then use this to hypothesize about the best way forward to success.”

For Freedman (2006, 22), a patriarch of strategic narrative theory, narratives “are strategic because they do not arise spontaneously but are deliberately constructed or reinforced out of the ideas and thoughts that are already current.”¹⁴ This is similar to the idea that “[n]arratives are composed for particular audiences at moments in history, and they draw on taken for granted discourses and values circulating in a particular culture,”¹⁵ In a familiar essay, Antoniadis, Miskimmon and O’Loughlin address “narrative work great powers undertake to establish and maintain influence in the international system and shape the system itself”¹⁶ The function of these narratives is to extend influence, manage expectations and change the discursive environment. Strategic narratives take the actors’ understandings of international politics, gather them into intelligible patterns, traditions and ideologies and connect apparently unconnected phenomena around some causal transformation. While storylines are “sense-making” and organizational, “narrative” can be distinguished, these writers say, in that they take an initial situation or order, identify a problem that disrupts that order and produce a resolution

¹¹ Roselle, “Strategic Narratives of War.”

¹² Murray Edelman, *Constructing the Political Spectacle*, 108.

¹³ Frank Scott Douglas, “The Year After Zarqawi: Strategic Narratives, Peripheral Operations, & Central Vision in the ‘Long War,’” (draft for ISA 2008 Annual Convention in San Francisco), 2008: 4.

¹⁴ Lawrence Freedman, *The Transformation of Strategic Affairs*, 22.

¹⁵ Catherine Kohler Riessman, *Narrative Methods for the Human Sciences*, (Thousand Oaks, CA: Sage, 2006), 3.

¹⁶ Antoniadis, Miskimmon and O’Loughlin, “Great Politics and Strategic Narratives,” 7.

that reestablishes or has the anticipation of restoring order. For Hajer, the “key function of storylines is that they suggest unity in the bewildering variety of separate discursive component parts of a policy problem,”¹⁷ but still the additional measure of consensus or agreement or power is necessary so that the storyline becomes strategically functional. The objective—what makes a story a strategic narrative in international relations—is the implicit inclusion of a “tacit set of rules” as Antoniadou et al. put it “for how foreign policy actors are to perform in certain speech situations and articulate responses to policy challenges and problems.”¹⁸

Archetti enlarges the lens from state actors to nonstate actors: “Narratives are central to the practice of international relations. Governments use narratives strategically to achieve desired objectives: defining their countries’ identities, explaining their role in the world, identifying allies and enemies, establishing the nature of the relationships among them; contextualizing historical events, as well as policy decisions.”¹⁹ But, as she points out, “the context in which contemporary international relations take place . . . is not characterized by the interaction among states only. Access to global communications has empowered . . . states, NGOs, corporate actors, transnational actors, even private citizens [all of whom] have acquired a voice” (Valencic, 2001).²⁰ The possibility of communicating instantaneously with global audiences across distances at almost no cost gives nonstate actors both visibility and the power, to different extents, to influence the conduct of international politics. Indeed, “these actors might not have substantial financial, material or military resources, yet through the persuasive power of strategic narratives can mobilize audiences across national borders (Douglas 2007; Betz 2008).”²¹

III. What Makes Narratives “Strategic”?

I go somewhat beyond the existing definitions in describing the work that is done, or is hoped to be done, by these implicit international understandings that are to have predictive or ratifying effect. My claim—in a sense my twist on the work of the scholars I have cited—is that narratives are *strategic* if and only if they have the purpose of assuring that the story predicted by the narrative will take place, or threatening consequences if it does not. These

¹⁷ Maarten A Hajer, *The Politics of Environmental Discourse: Ecological Modernization and the Policy Process*, (Oxford: Clarendon Press, 1995), 56.

¹⁸ Antoniadou, Miskimmon and O’Loughlin, “Great Politics and Strategic Narratives,” 4.

¹⁹ Christine Archetti, “Terrorism, Communication and the War of Ideas: Al-Qaida’s Strategic Narrative as a Brand,” <http://www.academia.edu/221753/>, 1.

²⁰ Ibid, 2.

²¹ Ibid, 2.

narratives are scripts with discipline, scripts with consequences for nonadherence. In their implied coercion, strategic narratives are akin to law—or at least aspire in that direction. Narratives are strategic if they perform the functions that scripts play in conventional theater, namely to bind actors to roles—indeed, to hold the actors (with wild differences based on authorial or directorial perquisites) to expected ways of behaving. Strategic narratives purport to pull key participants within their sweep, not only those who were the architects or writers of the script but also those who can affect whether that script will be successful in its overall performance. This is akin to what Antoniadēs et al. mean when they argue that through the use of strategic narratives, “great powers can project their values and interests in order to extend their influence, manage expectations and change the discursive environment in which they operate. These are narratives about both states and the system itself, both about ‘who we are’ and ‘what kind of system we want.’”²²

The years of the Warsaw Pact were about the sustaining value or bankruptcy of such narratives and the need for force to compensate for their inadequacies. In the Arab Spring, it was the new narratives that began to prevail. Mubarak and Saif Gaddafi were subject to such narratives: what they willed, what story they would have liked to tell, was subordinate in some way to the values and interests of others. These values and interests played themselves out relatively quickly, as in Egypt, or in slow, difficult motion, as in Libya (and later Syria). The decline of old narratives and the rise of new ones in Central and Eastern Europe was hardly sudden, though the concatenation of dramatic events made it appear so.

Narratives that are strategic do far more than frame issues. Framing is less prescriptive, less ordering. The strategic narrative is separate from what might be called the “strategy of action.” A strategic narrative is not merely or mainly a blueprint for action in the field; it is a blueprint for understanding and interpretation. It is tied to the future of the state. It must be related to its history, but shine a light on what will become of it. A strategic narrative, in this sense, can affect actions (indeed, it should do so), but it operates at a higher level of emotional connection. Strategic narratives become, at their most compelling, charismatic visions. One ideal for strategic narratives is to be part of a resolution of conflict, a near magical formula that brings warring parties together or heals internal wounds. The Dayton Accords contained within them a strategic narrative for the Balkans. These were strategic narratives embedded in consensual documents to which parties agreed.

For those proclaiming such narratives, some kind of sense (at least temporary sense), had been made of the world, and mechanisms were put in place to enforce them. It was expected that even actors not fully a party to the

²² Antoniadēs, Miskimmon and O’Loughlin, “Great Politics and Strategic Narratives,” 3.

narrative's construction would see the light and, if at all possible, conform. The denouement, in each case, could be said to be a dramatic success, even though key players refused properly to adapt to the new context. The international narratives in Egypt and Libya (much the same analysis could be made for Syria) had expectations built into them, expectations of what the leaders would *do* and before that, what they would *say*. They were specifically confrontational and against the ruling authority. In 1989, a previous set of strategic narratives—those with a Soviet legacy—were delegitimated, and a new set of strategic narratives—those with roots in the Enlightenment—were suddenly privileged.

What can we learn about what narratives prevail? Looking across the two cases—1989 and 2011—the following model might be useful as a way of identifying strategic narratives of interest: A narrative can qualify as strategic—has a prospect of being binding—if (a) it gained consensus among key international actors (consensus-based narrative) or, (b) in lieu of consensus among such actors, was deemed binding because of the power held by the maker or collaborative makers of the narrative (power-based narrative), or (c), in lieu of such external power, had such narrative strength in an aesthetic of interpretation that it became an (or the) accepted version of what should occur (self-generating narrative or charisma).

Each configuration has its interest, and most instances in the emerged dramas of the Arab Spring and of 1989 partake imperfectly of all three. Take the first—an agreed-upon approach among key international actors that accompanies or precedes an action. This does not mean a reenactment of a Yalta-like event. It may be an agreement that occurs by telephone or intermediary, explicitly or by nods and winks. It is a narrative designed to build consensus among domestic or international publics. It can be formal, articulated, and explicit, as in the Libyan letter of Sarkozy, Cameron and Obama. Or it can be more informal, as in distinctions between supporting, abstaining, or resisting an international approach—as is frequently the case involving China.

In the second case, power, not consensus, legitimates. Power creates the illusion of consensus, but it is often illusion that undergirds the strategic narrative in the first instance. Understanding power may be central to understanding why an agreement was shaped and why it looked the way it did. Strategic narratives based on power were characteristic of the Cold War period, where, for example, Warsaw Pact countries followed a Soviet lead, or a superpower reality where narratives invented in Washington—in a more recent era, one might think of Iraq—are subscribed to elsewhere. One might quibble, arguing that where it is power that does the work, the nature of the strategic narrative is less important. But we have seen that regardless of the extent of power, a strategic narrative helps in consensus-building and maintaining, even if for faulty reasons, power's legitimacy.

The third case is closest to what might be called a “pure” strategic narrative: where it is the compelling nature of the narrative itself that serves to marshal support and agreement among key players and key publics. This could be strategic narrative by epiphany, or strategic narrative by the most artful understanding of the needs of contending participants. It might be strategic narratives that are based on religious fervor, where the emotional consensus-building elements for the significant participants are already present. Pure strategic narratives can be the most compelling. Such narratives permeate social networks and gain adherents. They rely not on the fickle properties of consensus by actors who often have conflicting interests, nor do they rely so much on military force.

In all three cases, narrative can fail at its strategic purpose, and failure is frequent. Key actors may, for one reason or another, depart from the agreement and their consensus cannot be enforced. States fall out with other states. Disclosures may make the narrative no longer tenable. A strategic narrative may be dependent on representations of the real world that no longer have credibility. The publics the narratives were designed to influence may turn out to be unaccepting. And an account that seemed an epiphany, or a narrative that transcended current divisions and, in itself, deepened loyalties and allegiance, can be washed away in a moment of mass transformation. In Yugoslavia, the potential for such disintegration of the strategic narrative was always present.

In both the Arab Spring and 1989, the sustaining role of the intelligence agencies and residues of the military also played a role. Subterranean continuity often silently conquers the appearance of radical change. In Egypt, the narrative of democratization was threatened by the sustaining role of the military, violence against civilians, and the lingering ambitions and sense of entitlement of the old guard. In Libya, to the extent the narrative was built on the premise that there were rebels capable of gaining control, the regaining of ground by loyalists, persistence of a stalemate, errors by NATO forces, disarray in rebel ranks—all of these posed problems for the strategic narrative. Over a quarter century, this tension between which vision of the future would incorporate which elements of the past continued in Hungary, the Czech Republic, Poland and elsewhere.

The narrative might be an accurate portrayal of why a decision to act was taken or what is planned or proposed as course of action or a narrative about a past. But a strategic narrative need not be and often is not fully accurate. Strategic narratives may purposively avoid “reality” in order to build consensus, projecting solutions that, as an intermediate matter, may be unattainable so as to gain conformance by wayward participants. Fictions become building blocks of narrative aspirations. Because the function of the narrative is to achieve and build consensus, the appearance of transparency and credibility is critical, but it is primarily for such credibility that accuracy and truth-telling is a factor.

IV. Models of Strategic Narratives and Impact of Social Media

The Arab Spring took place at a time of social media and the Internet. Did that make a difference? To be sure, the new media technologies, the social media, provide a check on the capacity of elite international players to establish a controlling framework. Many have asked whether the rise of these innovations are consequential in the structuring and functioning of strategic narratives. Consideration of strategic narratives and their impact began in an era of more conventional media, when leaders had greater capacity (or at least considered that they did) to control messages and their diffusion, or to control opinion about the source of the narrative. It was CNN and the CNN effect that was the first systematic shock to an earlier system of managing the production and distribution of strategic narratives. Al Jazeera further altered the mode of creating and distributing strategic narratives, particularly in the Middle East. The Internet, Twitter, cell phones, satellites—all of these have affected how these narratives evolve and what constitutes their life cycle. Narratives, both domestic and international, are more vulnerable. Real or imagined deviations from accuracy can be spotted and highlighted. Secret or discreet agreement with a strategic narrative may be more likely to be uncovered and publicized. And competing narratives—ones that represent a more compelling myth, a more impressive group of key players and a different concatenation of power—can be produced and rendered viral instantly. As a result the stability or half-life of a reigning narrative may become shorter and shorter. An international narrative that is out of sync with facts on the ground is always susceptible. But the increased penetration and use of social media makes this lack of synchronicity particularly salient.

There are two audiences for a strategic narrative. First in significance is the home audience of the major powers where populations are called upon to support, finance and enforce a narrative. A narrative for Libya and Egypt must resonate with the pervasive and overarching hopes and dreams—the idea of an international role—of populations in the UK or the United States or France. In democracies, political leaders have to persuade their constituents and shape an account that brings them gently into the frame. But the key actors for whom these narratives constitute a script obviously include the authorities in the target society, as we have seen with Mubarak and young Gaddafi. Indeed, they are the actors who are to be brought to heel, if possible, who are subject to the hoped-for binding nature of the narrative, who are to be persuaded to follow an international script. And it is here that the implications of social media become central. Enforcing the global narrative against the local central actors presents significant barriers if, in an intensely socially mediated world, the local socially mediated reality is strongly inconsistent with its international counterpart, relatively passive, or strongly divided.

An internationally forged strategic narrative may, and possibly should, lose credibility if it is dramatically inconsistent with on-the-ground opinion (as manifested through social media), and a divided and conflicting narrative loses the benefit of reinforcement and expansive network effects. But this is not always the case. In the future, it will be useful to determine the extent to which international players seek to influence the local tenor of social media (to render it more congruent with an emerging strategic narrative) and the extent to which leaders in a target society seek control to maintain a separation.

To test any of these propositions would require a state-by-state examination of the societies of 1989 and 2011, a task well beyond the scope of this chapter.²³ If there were a more complete history—from beginning to some

²³ Indeed, even in the choice of umbrella term—“awakening” or “spring”—there is an implied turn to the narrative. The Arab Spring terminology is evocative of 1968, the Prague Spring, and by extension of the dissolution of the Soviet bloc post-1989. Ben Zimmer wrote evocatively that “The obvious model for *Arab spring* is the *Prague spring* of 1968, when Czechoslovakia enjoyed a brief interval of democratic reform before the Soviet Union invaded. But even before 1968, *spring* and *springtime* have had a long history of usage to refer to optimistic periods of political transformation, and the same goes for equivalent terms in other European languages.” In the nineteenth century, when revolution struck Germany and other nearby countries in early 1848, “*Völkerfrühling* was readily applied to the uprisings. . . . [Carl] Schurz recalled the Germans’ “enthusiastic enjoyment of what they called the ‘*Völkerfrühling*’—the People’s Springtime.” In the twentieth century, “the first political movement to earn the *spring* label was Russia’s Liberal reform of 1904, a forerunner to the country’s revolutions of 1905 and 1917. In his 1917 book *The Soul of the Russian Revolution*, the writer Moissaye Joseph Olgin explained that ‘the second half of 1904, known as “Spring,” was marked by a strong Liberal movement.’ The Oxford English Dictionary’s entry for *spring* notes that along with the *Prague spring* of 1968, there has been a *Polish spring* of 1956 (and again in 1982), and even a *Seoul spring* in South Korea in 1979.” Zimmer observes that “These springtime labels all owe their rhetorical power to a master metaphor that transfers the qualities of seasonal change to political change” (Ben Zimmer, “The ‘Arab Spring’ Has Sprung,” *ThinkMap Visual Thesaurus*, 20 May 2011, <http://www.visualthesaurus.com/cm/wordroutes/2855/>).

The “Arab Awakening” suggests a slightly different narrative from the Arab Spring. The Arab Spring idea has a built-in irony because of the tragic end of the Prague forbearer. The term bears within it the prospect of failure. Awakening also suggests a narrative that has more of a mass impact, the slumbering multitudes coming to an awareness of their future. Spring is an externally determined event, cyclical, almost divine. Awakening could be self-generated. There has been dispute among those seeking to characterize the events as to which label is more suitable. From a strategic narrative perspective, this could be an element of branding: What name makes it more likely to hold a coalition together, what inference will bring support to a set of ideas and a plan? As might be expected, such a term has limited applicability as the specific events unfurl and the reality becomes muddier. There is the shift from spring ultimately to winter and there is the complex understanding, after an awakening, that the realities are not so ideal as was first envisioned.

critical point, one could ask, for each of the states involved, these questions: (a) Was there a settled international strategic narrative that came to meet one of the three categories of potentially viable accounts (consensus supported, superpower supported or charismatic)?; (b) Can one describe how rapidly or completely the strategic narrative process moved from formation to application?; (c) To what extent did events on the ground, or in the world at large, conspire against the narrative and lead to its weakening?; and (d) How did the new communications technologies and social media affect the formation and application of the strategic narrative? Taken together, one might evaluate whether a strategic narrative in some articulable way “succeeded” or “failed” in its application.

One can see the relationship between “strategic narrative” on the one hand, and reaction of authority on the other. Throughout the Arab Spring, the exercise of narrative power by the West—announcements, letters, emissaries—were met by rejection and contempt by the then-in-power leaders to whom they were addressed. Even when there were attempts to fall in line, the resentment was not far beneath the surface. And throughout, in reaction to the narratives of democracy propounded, a spate of counter-efforts were attempted. A measure of a strategic narrative is the durability of the account. In Libya, for example, circumstances on the ground and in the air were constantly rubbing against the accepted narrative. It was increasingly unclear whether the cost of fidelity to the narrative was too high for otherwise strained US or European participants.

I suggested above three models for legitimating strategic narratives: consensus, power and charisma. When Mubarak faced the microphones and gave “the wrong speech,” he was defying—perhaps consciously—the narrative of positive social change and gradual, more significant, transfer of power. It was a narrative that had an arc—from protests in Tahrir Square to a promise of a new election process, a new generation of involved citizens, and a more democratic outcome. In the face of his actions, there were elements of all three ingredients I listed: consensus among key international actors, grounded in power, with a high-concept drama that had transcendent qualities. And the international narrative was synchronous, or seemed to be, with internal developments. Not only was the narrative about the future of Egypt an outcome of intense discussions among Western governments and with the Arab League, it was a reflection of the power of the street. As a result it had sufficient impetus behind it (though there were those, such as the Saudis, who disagreed intensely with elements of the narrative) to function in strategic form. Finally, the narrative had a romantic appeal. It was the playing out of a dream, echoing the events of 1989 in terms of their aesthetic power.

V. Conclusion: The Complexity of Reliance on Strategic Narratives

There are several traps in the invocation of “strategic narratives” in the account of 1989 and 2011. First there is the problem of overbreadth. It is hard to distinguish between narrative and *strategic* narrative. I have suggested that a distinction lies in the disciplining or potentially binding nature by which the narrative operates. But here too, as I have pointed out, there is a fragility. Where they exist, strategic narratives are tenuous, as is their capacity, even their potential, for guiding and controlling conduct. It is difficult to evaluate what disciplining power can be attributed to the narrative itself, as compared to the power structures that underlie it. It would be useful to see how strategic narratives affect public opinion, both in the target society and at home. And as the long perspective indicates in 1989, the new narratives—those of glory and enlightenment—can also be seen in contrast to strategic narratives that went before. It is as if the shift is from one set to another, with the aspiration, but not the inevitability, that progress will occur.

As to each of the states involved, we can ask these questions: (a) Is there now (and was there in the 1990s) a settled narrative that meets one of the three categories (consensus supported, superpower supported or charismatic)?; (b) What stage in the strategic narrative process is involved: formation, application, regression?; (c) How do communications technologies affect the formation and application of the strategic narrative?; (d) Has a strategic narrative “failed” in its application? Since circumstances change, it is difficult to comment on these variables. We have seen that what appears to be a suitable characterization at one point, alters at another.

Illustrations beyond the Arab Spring are legion and significant. Take the strategic narrative that accompanied the decision to go to war in Iraq in 2003 concerning the presence in Iraq of weapons of mass destruction.²⁴ The narrative was strategic because it bound sufficient international players for key moments in time. It was effective because the key players actually performed for the time necessary for elements of the narrative to be achieved. Again, it had elements of the three categories I have described above: agreement, exercise of power, and what seemed to be a sufficiently compelling story to adequately enlist and carry public opinion. In some ways, the fact that the narrative was not based on actual facts merely illustrates the significance of

²⁴ Amelia Arsenault and Manuel Castells, “Conquering Minds, Conquering Iraq: The Social Production of Misinformation in the United States—A Case Study,” *Information, Communication & Society* 9.3 (2006): 284–307, <http://annenbergh.usc.edu/Faculty/Communication/~media/Faculty/Facpdfs/Castells%20Iraq%20misinformation%20pdf.ashx>.

the narrative independent of reality. One could argue that the years of seeking a “solution” to the Middle East peace process were exercises in successive efforts at developing a strategic narrative, as well as at demonstrating the powers and the limits of such efforts. The Oslo Accords, the Camp David Agreements, and any number of “roadmaps” all contained narratives designed to be strategic and ultimately binding.

One constant, across the Arab Spring, seemed to be the relationship between the incumbent government and the domestic military. The capacity of the international players to establish and enforce a strategic narrative was a function of the relationship of the military to the incumbent. In Bahrain and in Syria, the military adhered to the government. In Libya, this issue of military fidelity was a drama that affected the credibility of the international scenario, especially after the controversial assassination of General Younis, the high-ranking government official (and military officer) who had come to the rebel side and was leading its forces. In Egypt, it was a decision of the military that may have rendered possible the narrative of Tahrir Square victory. Another element eating away at consistency of the emerging strategic narratives, and a variable among them, was the relationship of protest to Islamist influence or power in a post-“Awakening” government. Looking across strategic narratives—to determine whether there is a higher level abstraction—is there a “strategy” of strategic narratives? In the case of 1989, one would look—from state to state—at the sustaining power of intelligence agencies, of the Church or other entities that transcend the narrative appearances.

It is here, among other places, where Archetti’s work, already cited in this chapter, is helpful. She resists “reification of the narrative, the belief that it has an objective existence outside the mind of audiences—a notion that clashes with the understanding of narrative as a social product only existing through its continuous re-telling.”²⁵ Further she reminds the reader of the complexity with which the various narrative inputs are received, particularly in light of new technologies. Using a metaphor of differentially placed mirrors in the field through which a narrative is refracted, Archetti asserts:

the position within the social field will affect the orientation of each individual’s mirror, its surface (whether it will be smooth or rough), whether the mirror will be straight, convex (emphasizing a part of an image much more than the rest) or concave (leading to an upside down reflection: an opposite reading). The position also affects where (to which people) the image is going to be further reflected to. Network analysts would say this depends on the ties the individual has with the broader network . . . Some actors might plan to convey specific images/messages but the image they will ulti-

²⁵ Christine Archetti, “Terrorism, Communication and the War of Ideas,” 7.

mately reflect is itself shaped by their own position in the field. The planned image/narrative an individual might intentionally convey is being re-interpreted at each stage of the communication process. The image is being reflected further and, again, the way it looks at every stage depends on the position of each mirror and on the nature of the mirror surface. There is no guarantee that the image will keep the same shape.²⁶

Strategic narratives are not the product of vast changes in the global information environment. They are not, necessarily, the products of the kinds of transnational efforts by one state to alter the media space of another. They are not dependent, though they may be affected, by the rise of social media in a particular context. They become part of strategic communication as players—energy companies, hegemonic powers, neighboring governments, and other alliances—understand the power of strategic narratives and purposely engage in shaping one.

²⁶ Ibid, 5.

Four Dangers for Freedom of Expression and the Internet

AN INTERVIEW WITH FRANK LA RUE, UN SPECIAL
RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE
RIGHT TO FREEDOM OF OPINION AND EXPRESSION,
BY PÉTER MOLNÁR

PÉTER MOLNÁR: Let me start with a general question: As the UN Special Rapporteur on Freedom of Expression, how do you see the recent changes and developments in free speech issues?

FRANK LA RUE: In the world?

PM: Yes.

FL: I see four main problems and I think many of them are derived from the rise of the Internet. I think the Internet is one of the most wonderful things that has happened to communication, and it can actually enhance, not only freedom of expression, but it can also enhance citizen participation and the dynamic participation of people to strengthen democratic governments, so I think it's very important. It can also enhance the exercise of other rights, which is why in my report to the General Assembly I insisted that we have to look at the issue of access to the Internet, because we have to make sure that the Internet does not become the instrument of a small elite, a technological or an economic elite, but it becomes an instrument that has to reach all. This is a little bit like when Bell discovered telephones. The telephone network was only useful when there would be a policy of universal coverage. Telephones never got to be universal, but the policy was in place. And that's what made it affordable. I don't know if we will ever see everyone having a connectivity to use the Internet, but it's important that that policy be in place by all states, that they make their effort to allow every single person in their

territory to benefit. Maybe the use, it will not be individual, maybe it will be collective, like in computer centers or in libraries in the smallest villages and most remote rural areas, but what's important is that everyone has some form of access to benefit from it.

Now, I divide access in two. I divide access into content without censorship, so everyone can document and find opinions there with diversity and plurality. And I also insist on access to infrastructure, connectivity, software, hardware and everything you need. Both of them are different but they complement each other. Access to content also must respect the cultural diversity because we must have the possibility to have content in many languages and minority languages and adding to minority cultures. And with access to infrastructure it must be the same thing. There must be scripts, or minority languages so everyone can be able to—so there are not still people unable to have access. I am speaking of this because access in Europe may not seem relevant at all, but in the rest of the world—in the developing world, in Latin America, in Africa, and South Asia or Southeast Asia—it makes a big difference because over there, there is a huge amount of the population that still doesn't have access.

And secondly I talk about this in reference to freedom of expression. It is important that we put the Internet in terms of freedom of expression, which includes access to information, to have it to make informed decisions, for access to public information, for transparency, but I insist on this because there are other rights that can be exercised, too. For instance, in the future we will not be able to separate the Internet from the right to education, from the right to establishing the truth of the past. Many historical archives will be digitalized and transferred to the Internet. From the freedom of association, and freedom of assembly, and peaceful mobilization because the Internet will be a mechanism of capability, and especially with the issue of cultural diversity, I think the Internet will be the mechanism in which all cultures can produce their language with their traditions, their values and present it to the world. In the UN Declaration of the Rights of Indigenous Peoples it says that indigenous peoples should have rights to their culture and their values but also to have media of their own. "Media of their own" in the past for me has meant broadcasting, radio and television, but today it also means the Internet as a way to develop their own mechanisms of communication. So this is the framework—an Internet that is useful in a possible way for all.

Now what is the downside? The downside is that the Internet has brought some problems. One problem is the misuse that can happen. The Internet became a very powerful tool of communication because it has something that other technologies do not have. The prior technologies were unidimensional, they were in one direction, whether it be written media or broadcasting. The Internet adds a new element which is multidimensional

or multiactive oral communication where one can communicate in real time to thousands of interlocutors, but at the same time they cannot respond in real time. Or they can interact among themselves. And this is what makes the Internet so powerful and makes the possibility of mobilization real. Now, this has provoked fear in politicians. Because obviously criticism goes faster. Governments can be toppled and the experience of the north of Africa, of Tunisia, Ben Eli, and Mubarak in Egypt has scared them further, instead of looking at this with optimism as this is the possibility of change in the future toward more democratic societies. Everyone, every sort of authoritarian politician, sees this with fear, so the immediate reaction is how to establish mechanisms to limit the use of the Internet by either blocking messages or blocking websites, or to limit the use by criminalizing some messages and some... There is now the renewal of the crime of defamation or the crime of national security threats or of anti-terrorism and many crimes are being recreated because of that. And I believe we are all four rapporteurs on freedom of expression. This year, on May 3rd, we are making a joint call for decriminalizing freedom of the press and freedom of expression in general, which is very, very important.

Now, this is the element, in terms of the fear that it generates, which is provoking a violent reaction, which in some cases is the violence against journalists, because journalists now go online. It's violence against citizen journalists, bloggers, because they report on news that was before not being covered by anyone. A natural disaster like in Japan or in Haiti or also political disasters like elections or riots or the bombings in Syria or anywhere else are covered by citizens with their mobile phones and the photographs that they can take.

I think it's very important for them to look at this fear that the Internet has provoked. It has created four problems in the world like I mentioned. Number one is the progressive use of violence against journalists and bloggers, and that is very clear. There is a rise in violence around the world. And, I think this is very serious, and we have to stop that. We have to limit it, we have to insist on the special protection for journalists and citizen journalists, and, specifically, we have to insist on an end to impunity in all cases. All cases have to be investigated and those responsible prosecuted and the crimes solved. Because every impunity is a call for more violence, and I consider that one of the causes of more violence is that every case that is not solved is an invitation for several more to happen.

The second problem is the use of criminal law, the ascent of criminal law. Confronting defamation, libel, or anti-terrorism efforts, all of which are issues in which criminal defamation should not exist. Obviously the responsibility of a state to combat terrorism is real and legitimate, but they are being misused. They are being used excessively. And, here is where it all falls under the fact that limitations to freedom of expression should fall under the boundaries of the criteria established in international human rights doctrine, of

being established by law primarily, being in the defense of other rights very clearly, and the third one being necessary and proportional to the defense of that right. If it doesn't fall under the three-part test then they should not be allowed, and I believe that most often these crimes do not. (For instance, in Thailand you have laws that, yes, talk about protecting the monarchy, but in reality are a censorship of speaking about a transition, and are considered a national security threat.) In some other countries, there are crimes against religion that are also considered a national security threat—defamation of religion in Islamic countries or blasphemy in European countries—which are also considered either against the culture, the traditions or the power of the state, and therefore also become a threat. We should not allow that. Other crimes are new crimes being created. In my own country of Guatemala, they established a new crime of financial planning. Anyone on the Internet who provokes fear, and people withdraw their money, they can be considered liable for a criminal lawsuit. This is absurd. When banks are weak, it is because they are not well managed and it is because the government does not regulate them appropriately. It is not because the people criticize them. On the contrary, there should be more criticism of the banking system and the financial system because this is how we can prove that Wall Street and the crisis of the mortgage companies would not have happened if there had been more attention to the present and more criticism and not less attention. This is topic number two, the criminalization.

We are going to, all of the four free speech rapporteurs, the three regional and myself, are going to make a call on May 3rd to decriminalize, to progressively leave as a crime only those issues that are legitimately a crime, when there is clearly a threat to national security and incitement to terrorism and there is clearly a threat when there is incitement to hatred, hostility or violence, against other people on the basis of race, nationality, religion or gender or sexual orientation or disability. Those issues that lead very directly to discrimination.

PM: Do you think that incitement that can directly lead to violence, discrimination or hatred can justify criminal restriction of speech?

FL: Some of the human rights instruments talk about prohibition. On the Convention on the Prevention and Punishment of the Crime of Genocide, or CERD, the Convention on the Elimination of All Forms of Racial Discrimination, Article 4 talks about prohibiting any speech that talks about the superiority of a race, or the Optional Protocol on the protection of the rights of the child, that talks about child pornography or the obligation of the state to prohibit the publication, elaboration, dissemination, and commercialization of child pornography because it's normally linked to child abuse, prostitution and trafficking. I believe these prohibitions are very important

and I think some of them are criminal. Child pornography is a criminal act by organized crime because it is also linked to trafficking. So those should not only be forbidden but those responsible should be persecuted criminally and put on trial and brought to court.

PM: I agree with that, but coming back to so-called “hate speech,” where would you draw the line between speech which can, and speech which cannot be banned as incitement to hatred?

FL: The point I was going to make is not all prohibitions have to be criminal law. Child pornography is the extreme case. Or incitement to terrorism when it really is incitement to acts of terrorism against innocent people. Those ought to be criminalized. But there are other forms of prohibition that could be different in terms of having different sanctions, civil sanctions. Or alternatives: the possibility of requesting a pardon, a public apology, or establishing an economic sanction. Or for public officials, the withdrawal of their post, the loss, if they use hate speech, or racial slurs or discriminatory language, the fact that they can be brought down from their position. So, there could be other forms of punishment and sanction to apply the prohibition, not necessarily always criminal law. That’s the point I was trying to make.

And secondly we have to be very clear that there is a difference between offensive speech and hate speech, and this may sound like a subtlety of language, but there is a very small but clear difference because there are limits of offensive speech, that although it is offensive and nasty and a bad or cultural habit, like blasphemy, for instance. It’s a bad habit, it’s a horrible offensive intonation, but it should not be a crime because it doesn’t fit the limitation; it would fall excessively on limiting free speech. Religious symbols, as religion, are open to discussion, even if some may find that discussion offensive, others will not. This was the case with the Danish cartoons. Cartoons are, by nature, in jest. They are mockery of a person, of an idea, of a principle, and that is why they are successful as a message. If we limit the nature of cartoons, then we are limiting a form of journalism. So, we have to be very cautious in the fact that limitations are legitimate and should be applied. I think legitimate limitations actually enhance freedom of expression, because they leave freedom of expression as an open space. But the abuse on the limitations, and the misuse of limitations can actually harm freedom of expression very seriously and provoke a chilling effect. This is what we have to be cautious of. Hate speech does exist but we have to be very clearly defined with very high standards of a threshold. There has to be very clear danger of a violation, not necessarily violence, which is the standard for the American violation. But I think it could be a very clear risk of violence but also a very clear risk of violating a right, the execution of a discriminatory act or a very offensive act that really harms the dignity of a person. I think this should be

limited, yes. But it has to be in the very extreme case. And there has to be imminence, there has to be possibility; the context is very relevant.

PM: And how would you differentiate between speech which hurts the dignity of people but cannot be prohibited and speech which hurts the dignity of people so much that it justifies exceptional restriction to freedom of speech?

FL: I think the limit for me is the imminence of the violation of a human right. I think sometimes offensive speech is precisely that. It is offensive. It's not very nice, but it does not necessarily trample over a right, or violate a right. It does not necessarily provoke an act of discrimination or an act of violence or hostility.

PM: You mention the example of the Muhammad cartoons, which you don't think you would have published yourself, but you don't think they should have been prohibited, so that is still protected speech. So, the cartoons fall into the category of protected speech. I'm just trying to clarify the line that separates speech that is offensive but still part of free speech.

FL: Permitted speech. I think it is very difficult; we have to analyze the context of every situation, and not be limited to every... In the case of the Danish cartoons, I think the Danish cartoons were a bad concept and were mishandled. I always say it makes a difference with the *Fitna* film in the Netherlands. Well, the Netherlands did not prohibit the film but they very clearly did not represent their position. That, in itself, was important to a piece, and the tensions, it softened the tensions. So oftentimes the context can be determined and I think we should look at it that way.

PM: I see. Thank you for that additional point.

FL: We are talking about the four problems and the third, I think it's the use of the technological means of censorship, the monitoring, filtering and blocking. I think there's a bigger sensation, like I said before; politicians and state authorities feel they have to have the Internet under their control. So, slowly and without telling anyone they are creating their mechanisms in which they can monitor the communication, which is a breach to privacy and privacy rights, and within that monitoring, they can look at issues, they can censor, they can silence, they can filter and they can block.

PM: So, it's an issue of privacy, as well as of free speech.

FL: It's a free speech issue, as well, yes. On top of that, what they are doing, they are forcing the intermediaries to do the dirty work for them. Which is

also why I don't believe in intermediaries, I don't believe intermediaries should allow this to happen, either. If the state, if there is a decision to block a message which may be legitimate, it should be done with a court order. If the state wants to block some messages, or [take such action in] any other emergency, it can do so, but it has to assume the responsibility and order it; it cannot expect [to not be challenged]. Like in Korea: they have the Korean Standards Communication Commission, which just sets the standards, the servers—the ISPs have to monitor and block the outsourcing. And, this is mad because it's outsourcing oppression, and their oppressive act, without any one taking responsibility because the intermediary says, "Ah (shrug), those were the criteria of the state," and the state says, "Ah (shrug), that was the intermediary." I think it has to very clearly be done under state authority, preferably in the form of a court order.

And the fourth problem which is a bit different but equally relevant, also, for "hate speech," is the big conglomerates of communication and the monopolies... I think, as I mentioned at this conference, I think that in the mass media we have allowed a strictly commercial perspective to dominate everything. So media is no longer a vocation, a profession, a professional vocation to inform the public. Media and journalism is now a business, at least, for the owner. And, that says, number one, that owner interest, it is in profit. So, that means they are looking for news themselves, but not for good information, number one. Secondly, that it is very serious for having a balance and a good equity. And, thirdly, there could be a conflict of interest. Oftentimes owners of big conglomerates and media are also investors in arms factories, or in mining institutes, and oftentimes the coverage they will have will be in favor of their economic interest in other sectors. So, I think we are losing professionalism of the press in that sense, and it time where we recuperate this professionalism.

PM: Thank you very much. This was very comprehensive. Let me step back for a second and follow up on this. If we step back and look at historical developments (as some chapters in the free speech book that will include this interview will), we see how in 1989 freedom of speech and freedom of the press became possible in Central-East Europe after decades of overall censorship. At the same time, and in the 1990s as well, there were similar developments in all sorts of places on earth. There was a hope that liberal democracy and freedom of speech and freedom of the press will prevail. But in the new century we see a complicated picture. Some of the countries in Central-East Europe, and not only Russia, and several other post-Soviet republics, but also my own country, Hungary, which was at the forefront of the democratic change in 1989, experience new restrictions to freedom of speech and freedom of the press. A somewhat similar wave has been taking place in the Arab revolution countries in a shorter time. Also, in your own country, Guatemala, you describe how the media is in the hands of some ...

FL: Business interests, the mining companies...

PM: Some companies which have treated indigenous people in a very discriminatory manner. It seems that the picture is sort of a mixture. So, the follow-up question is: How would you put your analysis into the context of these mixed changes and developments since the fall of the Berlin Wall? Do you think that, overall, freedom of speech and freedom of the press have been improving, or it goes to the setbacks, and the complex set of alterations it is not necessarily a positive development?

FL: I think that history always moves forward. I think we are moving forward regardless of all these problems, but I think we have setbacks. One of these issues that proves that just exercising freedom of expression does not necessarily guarantee democracy, you have to have another combination of factors, for instance, the Arab Spring. I used to tell people these are not "Internet revolutions." These were the revolutions of the people of Tunisia and the people of Egypt. Using the Internet per se does not provoke anything, and it is the people that decided to get rid of a dictatorial, heavy-handed, authoritarian regime. But, we are very uncertain what type of regime will be put in place. But, we all thought because they were getting rid of a dictator, they would automatically move to something very democratic, but that is not necessarily the case. Depends. What is the political consciousness of that population? Maybe that population wanted to get rid of Mubarak but still believe in a more fundamentalist, religious, theocratic government ... hopefully not. But, the fact that mass media is being used, and the point I make is not a full guarantee that everything will be looking well. I think we will be having the same challenges. What it gives is an instrument for people to communicate verbally and communicate at an easier level, and that will help them to decide the model that they want. But, that doesn't mean the model will be good or that we will all see it in the same way. Maybe they will see it good, and we won't.

In the case of Hungary, I think it is very tragic. But, not only Hungary. In Hungary, I think ... Also it's Russia, it's other parts of Europe. People were used to having authoritarian regimes, and it gives me the impression that the exercise of democracy is not only a legal and political exercise, it's a cultural exercise. And, oftentimes the people are not used to that. For some people, democracy and especially a strong democracy, seems like excessive weakness for them, too much openness, because the tradition and what they were used to was more defined, more authoritarian. There is always a longing to go back to this, to a sort of patriarchal figure, a godfather figure that decides for everyone. My feeling is that in Hungary the popularity of Viktor Orbán is that, I mean, he represents this authority, these family values, the return to the private Hungary, in a mistaken way. But, this is not how the people perceive it. And, partly

because we have not been able to build a culture of democracy and a culture of peace, and this is a cultural phenomenon, we have to build in our daily relationships. And, with a culture of democracy and a culture of peace, we will develop a new media and a new professionalism that are a response to it.

PM: And, how can we do that? I suppose with education, right?

FL: I suppose its education and then the working with the younger generations for their political commitment. One of the problems we will have is that we have frustrated young people, that they will be depoliticized. We have to give them the sense of hope in themselves, in their energy, and their power. The one example of Tunisia, for instance, was precisely that it was the young people that took up from the streets and were able to change, hopefully for the good. But, it was interesting to see that that's what they decided they wanted, and they could get it.

PM: And, how do you see the role of the international rapporteurs? How optimistic are you about it yourself? So, how much impact do you think you can have on these developments, together with the three regional rapporteurs? This is wonderful that, the rapporteurs, you have developed this...

FL: Coordination...

PM: Yes, you cooperate and make plans together...

FL: I think rapporteurs in general have a tremendous power to draw attention to issues, but obviously, we cannot force change. The power is a moral power to make recommendations and point out problems.

PM: So you can act as ombudspersons for freedom of speech?

FL: Exactly. I think we can act as catalysts for the desires of the people. And, I think we can provoke the debate and draw attention to mistakes and to wrong things being done, but then it is up to the population to use them, to force their governments to change.

PM: Do you think that freedom of speech is contextual in a way that the system of freedom of speech and the legal framework and cultural practices would be necessarily different in your country of Guatemala and my country Hungary, or there are some universally viable applications?

FL: I think the exercise of a right may vary from country to country according to practice, but never the principles of that right. I always remind people that

the international standards for human rights are the minimum not the maximum, are the minimum required to respect human life and human dignity for everyone in the world. And, there is no space for cultural relativism. It is really important that we understand that they cannot, as a principle, change from culture to culture—they have to be the same. In practice, the way that they are being applied or exercised may change. I mean, the newspapers, the media may have a different format, a different form, but in all countries the principle of the freedom of expression has to be the same.

PM: Can you name some countries which provide encouraging examples and other countries which are places that are maybe in crisis in terms of freedom of expression, or that would be somewhat problematic with your mandate?

FL: No, no we can't. I like to point to good examples. One of the issues clearly on this sort of overcommercialization, for instance, is Argentina, which passed a law where it devised a spectrum for radio frequencies in three equal parts: one-third for commercial frequencies, one-third for community broadcasting, and one-third for local broadcasting. I think that's an interesting examples to apply the law in creating equity and balance in the use of frequencies, which is a national good. Then in Europe, in general, I think the best example of good public broadcastings are: The BBC, Radio Netherlands, and some other initiatives (in different countries) that are independent, but publicly funded, and play an important role with their good journalists. But, it's very clear that we have to rethink, with the Internet, for instance, that public broadcasting is losing its audience because it's not developing the most appealing approach, but on the other hand, we cannot allow only the commercial problems to appeal to the public, especially the young, because then they will only have light-minded programs with no substance and no content and that is also negative for the education of youngsters, so we have to be able to generate the balance.

PM: And how would you compare the transition toward freedom of speech, and open public discourse, and access to information in Central and East European countries to the former Soviet countries and Central and Latin American countries, and say African countries? In those regions or continents where they have heavy democratic transitions, are there setbacks or more encouraging developments?

FL: I think a comparison is too difficult because, for instance, Africa is marked by the lack of public services and the isolation. I saw experiences in Africa where people were doing community broadcasting and community radio through mobile phone because there was no electricity in their village, so they couldn't use radio, but they could use cell phones, so they charge them them-

selves. I think that the exercise of these rights will change very much from country to country. It's in the reality of the countries. That's why I keep saying that the principles will be the same but the mechanism in which every country will solve their problems is particular.

PM: How do you see the fact that the Inter-American Court of Human Rights has been doing better in supporting access to information as an internationally recognized human right, starting with the landmark decision in the *Claude Reyes* case, and the European Court of Human Rights is sort of struggling to follow?

FL: I believe that the Inter-American Human Rights Commission and Court is the most progressive body at this moment in the world.

PM: What is behind it that the Inter-American Court is delivering some really progressive decisions. Is it in part because of the text of the Convention? We know that in terms of access to information, the Inter-American Convention includes the word "access" while the European Convention doesn't have this word. It seems to me that the most important factor is the culture, so what creates the cultural environments that enable the Inter-American Court to take such progressive steps as they have been taking?

FL: I think the Inter-American system is a later system, later. It came later, and it learned from the experiences of the European system, and they improved that system.

PM: I see. And what do you think about the African system?

FL: I think it's going very slow. I think they are very good. It's following the Inter-American system but not as fast as people would desire.

PM: I know that you think that community radio is very important, as well as other forms of community media.

FL: I think it's crucial, especially for minorities and indigenous people. Anywhere you have racial, cultural, ethnic or religious minorities, linguistic minorities, community broadcasting plays a key role.

PM: I fully agree. Would you agree with what my dear friend, the late Ed Baker, argued for? He said about himself that he was a close-to-absolutist on classic free speech issues, so he really did not accept content-based regulations of free speech, with very few, very narrow exceptions, but he thought that what I call structural regulation of the media market was very

much necessary to make sure that all sorts of people and groups, including minorities and groups that do not have a significant market power, can have access to channels of communication, including broadcast airwaves and the Internet.

FL: I think that the big difference with broadcasting is that they are using the electromagnetic waves which are essentially the property of the state...

PM: Property of the public.

FL: And they are a public good, so I think that marks a big difference. That has to be regulated because, like any public good, it has to be used for the benefit of all.

PM: Yes, but would you agree that, in general, in terms of media pluralism, the state or states have to be actually involved in ensuring access for all?

FL: Yes. I think there are two different principles. I think what you have is that all the frequencies and the broadcasting have to be regulated by the states to use it equitably because it is a public property, but also separately, you have the principle of pluralism, which should be applied to all media whether its broadcasting, written media, the Internet, whatever, and this is essential.

PM: This principle of pluralism, and freedom of speech and freedom of the press is especially important for societies in transition.

FL: I think we must look at societies in transition today, like in Europe and in other parts of the world, and in the north of Africa, to understand that freedom of expression is the paramount issue in a transition. Because you have to guarantee freedom of expression to guarantee citizen participation and freedom of opinion, and that will guarantee a strong democratic model and a strong state. I always say that freedom of expression is not against strength. It's the contrary. It strengthens the state to defend itself and to guarantee security because it gives citizens the ability to be stakeholders in the future of their own country.

PM: Do you think that states can facilitate sufficient and independent media?

FL: I think it's important to look at the question of regulation. There should be sufficient regulation to ensure equity and access to everyone. But at the same time there should be no censorship, no limitations to opinion and content. Specifically, I think prevention is the most important element in building a culture of peace and respect. That is a cultural phenomenon, not a legal phenomenon, but I think states have to put a big effort in terms of their educa-

tion system, in terms of their cultural system, and in terms of public media, in building that culture of peace and respect.

PM: Thank you very much, Frank, for the interview.

FL: Thank you, Peter.

Freedom of Speech in the OSCE Countries

AN INTERVIEW WITH DUNJA MIJATOVIĆ, REPRESENTATIVE
ON FREEDOM OF THE MEDIA OF THE ORGANIZATION
FOR SECURITY AND CO-OPERATION IN EUROPE,
BY PÉTER MOLNÁR

PÉTER MOLNÁR: What in your view are the main improvements for free speech and freedom of the press since you have been in office? Are these general tendencies in OSCE member states (and elsewhere), or taking place rather in specific countries, or regions, and, if the latter, in which countries, or regions?

DUNJA MIJATOVIĆ: The environment is changing, although slowly, and in certain substantive areas for the better. Two of the issues I have focused on are violence against journalists and the rise in unwarranted regulations restricting Internet freedom.

Violence against journalists with impunity remains a main threat to media freedom.

We have been able to, for the first time, actually raise awareness of the scope of the problem across the OSCE region. Almost 40 journalists have been murdered in OSCE member states within the last six years. While we know that one journalist dead is one too many, we are seeing a general increase in the effort put forth to catch and prosecute the assailants. We now have the attention of governmental authorities, including law enforcement and the courts, in many countries. That is an encouraging signal.

I think we also have been able to raise the consciousness of the public to the dangers of Internet overregulation. In 2011 my office published an exhaustive study of national laws regulating Internet content and availability. The fact that it is a 345-page publication should reveal just how authorities, meaning government officials, politicians and, in some cases, courts, have chosen to take a meat-cleaver approach to Internet regulation to address

some difficult problems such as child pornography or terrorist threats. In the end, I get the feeling, based on the breadth of the laws passed, that the ruling political classes are less concerned about real problems and more concerned about dissenting voices being heard in their countries.

In sports parlance, we are playing defense right now. But we are providing a stout and effective defense to even more ill-conceived attempts at regulation. There is little doubt that protection for copyright holders is essential to scientific and cultural advancement. However, the issue is one that pits that protection against the right of free speech, which must be preserved. Two bills in the United States, SOPA and SIPA, appear to be dead when just recently their passage seemed inevitable. And strong opposition has mobilized against a similar measure in the EU, ACTA. Sometimes battling to a draw is a victory and that's where we stand today.

I believe that to promote access to the Internet by all segments of our society, a universal right of access should be guaranteed by the government. In a positive development, Estonia, Finland, Greece and Spain should be commended for proclaiming access to the Internet as a fundamental right. Their governments have therefore pledged to guarantee affordable broadband connection to all households.

On another positive note, we have seen some success in the move to decriminalize defamation. Since 2005, eight OSCE participating states have decriminalized defamation. Ireland, Romania and the United Kingdom decriminalized defamation in 2009, Armenia in 2010, and Kyrgyzstan, Montenegro and the Russian Federation in 2011. Even more have, in effect, placed a moratorium on criminal sentences because they are subject to the European Court of Human Rights decisions which have limited the scope for criminal penalties for speech and writing. Several states have acknowledged the need for such a reform. I hope to see many more participating states do away with it.

It is noteworthy that newer democracies are more willing to reform their outdated provisions than the older states. There are several reasons for this: There is more international pressure on new democracies because they actually apply the laws to restrict free media; potential EU candidates are eager to adopt reforms on the recommendation of the European Commission in regular progress reports and "older democracies" understand the importance of reform but do not think of it as a priority because they do not apply these laws to restrict media pluralism. In this context, it was very important to see Ireland and the UK, the older EU members, decriminalize defamation. This sends a positive signal to the new, emerging democracies.

PM: What have been the main backlashes, in any? Are these general tendencies in OSCE member states (and elsewhere), or taking place rather in specific countries, or regions, and, if the latter, in which countries, or regions?

DM: It depends on what is meant by “backlash” and who is striking back. There are countries in the OSCE region where the media climate is woefully restrictive. If we are talking about places where the environment is worse today than it was a decade ago there are several candidates.

Central Europe is generally considered as a region where media freedom and media plurality have been on the rise ever since the change of regimes in 1989 and accession to the European Union in 2004 took place. However, in the last few years we saw alarming signs that indicate either deterioration or insufficient progress in this region. The country whose level of media freedom has suffered the most in this region is Hungary, where in the last several years drastic legislative changes took place that could be misused to curb alternative and differing voices. The independence of public service broadcasters is a common problem, especially in Hungary, Poland, and Romania, while in Bulgaria violence against journalists and the lack of successful investigations into these crimes is a worrying sign.

Several countries have failed to adopt amendments to decriminalize speech. Croatia, Slovenia and the Czech Republic have amended their criminal codes in recent years, but preserved criminal penalties. This is troublesome.

Turning to other regions, disproportionately high pecuniary awards in civil defamation cases have been used in attempts to silence or even bankrupt media outlets. In Armenia, Kazakhstan, Moldova and Montenegro courts have accepted lawsuits demanding exuberant amounts to be paid by media or journalists to plaintiffs who are usually public officials or corporations.

In Belarus, which has been in focus of my office for many years, media freedom has steadily declined. The crash on the protests which followed the 19 December 2010 presidential election symbolized the renewal of tough policies and practices stifling media criticism and pluralism. This followed a relatively mild media climate of the preelection period. After the election, dozens of journalists were arrested while covering various protest rallies in Belarus. Several prominent journalists were charged with organizing and participating in illegal protests and were sentenced to jail. Although no journalist is currently imprisoned (one fled the country to avoid jail) many cannot travel and are subject to rigid administrative restrictions, limiting their ability to report freely.

In Ukraine I have observed a deterioration of media freedom. Cases of violent attacks against journalists have happened often and are not fully investigated. Arbitrary decisions by the licensing authority on allocation of digital broadcasting licenses have been questioned by many experts. The long-awaited access to information legislation has been enacted, but its implementation should be considerably improved and depends on the adoption of an additional package of laws. A law on public service broadcasting has not been adopted and enacted yet, although this was promised by the authori-

ties in the autumn of 2010 when I visited Kyiv.¹ Finally, the continuing trial on [Ukrainian journalist] Georgiy Gongadze's murder is being held in secret, thus raising more doubts about its outcome. Journalist Vasyl Klymentyev, who has been missing since September 2010, has not been found and his destiny remains unknown.

PM: Do you support the decriminalization of speech? How would you apply it to libel, and to "hate speech"? If you support the decriminalization of speech, would you consider any exceptions, and, if so, which speech you would keep criminalized?

DM: We are making headway in this office's attempt to end criminal penalties for defamation. This effort started when Freimut Duve was the OSCE Representative on Freedom of the Media, from 1998 to 2004, and has carried on since through the six years that Miklós Haraszti of Hungary headed this office, in 2004-2010.

Speech crimes should be decriminalized to allow uninhibited political, cultural, historical and social discourse. There is no justification whatsoever to put people in jail for expressing their thoughts. It is important that the public understand what is at stake here. Short of murder, throwing journalists in jail is the quickest way for some government officials to hide their wrongdoings.

PM: What do you think of the current state of responding to "hate speech"? To what extent, in your view, we are applying in the OSCE countries (and globally) effective responses and are engaging in ersatz displacement instead (for example, by banning racist speech without effectively eliminating discrimination and structural racism)?

DM: I think that the potential of self-regulatory mechanisms—i.e., ethics codes, press councils and ombudspersons—is to be further explored as ways to respond to alleged "hate speech." Overregulation by governments is not a good idea.

Hate speech is better dealt with by more speech, as was well said by my predecessor, Miklós Haraszti. While acknowledging that freedom of expression has limits, temptations to codify all of them in a criminal law would in any case result in blanket restrictions of speech. Therefore I call on governments to refrain from overlegislating on speech regulation, and encourage media to expand their professional association and develop voluntary self-

¹ The law on Public Service Broadcasting and the package to implement Freedom of Information law have been finally adopted in March and April 2014. Note of the editor.

regulatory mechanisms. Such mechanisms, tailored to the specific country conditions, such as culture and religion, can be very effective in meeting the challenges of fighting inflammatory speech.

PM: How do you see developments in access to information in the OSCE countries?

DM: Almost all of the OSCE participating states have adopted laws on access to information held by government bodies. Access to information ensures transparency and accountability of governments. It is vital for journalists who tend to use this right designed for all citizens on their behalf to ask governments questions that concern entire societies.

The laws are good, but the practice in still too many states should be improved. We still see that the deeply rooted culture of secrecy and the arrogance of the ruling elites lead to limited transparency, where many requests are illegitimately rejected or left unanswered.

The digital revolution has transformed access to information practices significantly. As data journalists are able to process and visualize larger volumes of data, entire databases need to be released by governments (with very few exemptions, where personal or other sensitive data can be blackened). This increases the need for better record-keeping, archiving in public offices and improves their accountability further.

The time is coming where governments will have to take the proactive step of publishing all their records which are not classified. Therefore it is essential that they invest into the needed infrastructure, tools and in staff training to be able to keep up with the growing public demand for information.

PM: How in your view has the Internet had an impact on freedom of speech, freedom of the press and access to information?

DM: Directly. The Internet is the game changer. It is given credit for all matter of events—including, most recently, the so-called Arab Spring. Whether it played a role or not is up for debate. But the entire technological revolution of the past 25 years has simply changed the way most of us perceive and interact with the world.

A literal world of information is now at our fingertips. Much of that content is unfiltered and unproven. In other words, it is raw, unedited copy. That is what we have today and it provides extraordinary opportunities for enhancing creativity and learning, aiding commerce, opening borders and creating a better life for many. But because it is unedited, we need to learn—perhaps teach ourselves—how to use what we learn. I am always eager to see how creative people are in using the resources of the Internet to pull together

disparate facts to come up with new inventions, new ideas and new ways of doing things.

And I am equally dismayed when I see the effect archaic government controls are [used to] attempt to thwart the Internet's full potential.

PM: What do you think of the situation in my country, Hungary?

DM: I have been closely following the development of Hungarian media freedom ever since the new draft media laws were introduced in parliament in June 2010. I warned the Hungarian authorities on numerous occasions that the new laws would undermine the guarantees of media freedom and could subordinate the media to governmental control. As the Representative on Freedom of the Media it is a very important part of my job to warn participating states as early as possible if planned legislation would breach OSCE standards guaranteeing freedom of expression and freedom of the media, which was the situation in Hungary.

My office has also prepared for the Hungarian authorities two detailed legal analyses with specific recommendations, but I was sorry to see that the drafts were adopted without any significant modification.

It would take too much time to get into all of the problems with the current media package. All of my actions with the Hungarian authorities were made public on my office's website. Here I would only like to mention the main weaknesses—and dangers—of the laws. They offer unusually broad powers to the politically homogeneous Media Authority and Media Council, which allows these bodies to control content in the media. Key terms of the laws are undefined, which allows for subjective interpretation and makes it difficult to know when a journalist is in breach of them. Violations are punishable with high fines, and even if fines are not levied, the mere fact that the law allows for high fines can lead to self-censorship among editors and journalists. I also have to mention the failure of the new laws to guarantee the editorial and financial independence of public service media.

The Constitutional Court ruled in December 2011 that certain elements of the legislation would need to be modified by 31 May. Parts of the media legislation banning certain content regarding print media were ruled unconstitutional, just like the rights of the Press Complaint Commissioner, allowing him or her to interfere with editorial decisions of the press in case of complaints. The decision also immediately abolished the limitation on the protection of confidential sources of information serving the public interest, so as of this year, court approval is required in order to force journalists to disclose sources. This applies even to cases dealing with matters of national security or crime prevention. Finally, the Court decision also annulled the right of the Media Authority to obtain editorial materials from media outlets without prior court approval.

These modifications would not fully remedy the situation, as other issues arising from the media law also require immediate attention, including content restrictions based on vague definitions, the politically homogeneous composition of the Media Authority and the Media Council and the lack of independence of public service media.

However, every reform has to start somewhere, and this occasion gives a good opportunity to the Hungarian authorities to improve the media laws.

PM: Thank you so much, Dunja, for the interview.

DM: Thank you, Peter.

Revisiting the Three Europes: Diverging Landscapes of Media Freedom

MIKLÓS HARASZTI

I. 1980s: A Winning Theory

Do you remember when the landscape of media freedom in Europe was sharply divided—just as in Budapest the Danube divides the hills of Buda from the lowland of Pest—by a long, dramatic barrier that ran from north to south and separated those who had freedom of expression from those who did not?

By now, you must be getting along in years to remember that, because the sharp divide I'm talking about existed before the 1980s. The Iron Curtain of communications remained fully intact only until the dissident intellectuals and democratic opposition movements of Central Europe discovered—or even, one might say, invented—the notion of “Central Europe.”

The actual reshaping of the free speech map of Europe was accomplished in the late 1970s by the samizdat movements, whose activists chose to speak out and publish freely even if they had to go to prison for it. I'm speaking about KOR in Poland, Charter 77 in Czechoslovakia and the Hungarian Democratic Opposition, of which I myself was a part.

And a broader public perception of the existence of three Europes—Central as well as East and West—was secured by authors such as Czesław Miłosz, in his 1981–82 Harvard lectures (*The Witness of Poetry*); Jenő Szűcs, with “The Three Historical Regions of Europe,” published originally in samizdat in 1983; Milan Kundera, in his 1984 essay “The Central European Tragedy,” published in the *New York Review of Books*; and György Konrád, in “Is the Dream of Central Europe Still Alive?,” published in 1985.

As writers and activists, we in the movement asserted that an intellectual and cultural middle ground, shaped by history, existed between the (free)

West and the (unfree) East. Do not be misled by the seeming uniformity of the communists' communicational dictatorship, we said. Do not despair seeing the same parameters prevail from Karl-Marx-Stadt to Komsomolsk-na-Amure—that is, 100 percent state control of all means of public conversation, and a 100 percent integrated class of public conversationalists, the state-employed intelligentsia.

We scoured maps and other historic sources for lingering evidence that set Central Europe apart. Most important for us were though the distinct regional features that persisted during the communist era:

- There were a hundred years of democratic tradition here, versus two hundred years in the West—and none in the East.
- Communist rule was forced on the region by military occupation after World War 2, as opposed to the “autochthon” communist revolutions in Russia and China.
- Upheavals against totalitarian rule took place in various countries in 1953, 1956, 1968, and in Poland with even greater frequency into the 1980s.
- In the wake of such upheavals, Soviet tanks restored order, but the restoration regimes had a weakened legitimacy and had to promise to “catch up with the West” on a number of accounts.
- And finally, to the point, there were the free speech movements in the region, which sparked the slow creation of an independently minded civil society inside communist states. This reality was a miracle that had been considered unthinkable; and, by the way, wasn't really perceived by Western strategists until the very last moment before the victory of these movements over communism.

Our conceptual battle turned out to be a success story, even a bit too much so. The Three Europes theory sometimes managed to deny any common ground between the two most distant ends of Europe. And it opposed Russia so successfully that it alienated some of our Russian friends who actually were the original creators of both samizdat literature and the very word that described it.

Anyhow, the main purpose of the concept of the three Europes was to *convince* ourselves that these differences existed, so that we could dare to *act* upon them.

As a result, as we all know and celebrate today, Central Europe liberated itself. Poland's pioneering role, and then Hungary's joining the Poles, produced the critical mass that triggered the chain reaction of dissolution of European communism. The process, however, became visible and believable for most Western eyes only when the East Germans and Czech-Slovaks were swept into the chain reaction, and the Wall fell.

Soon after, even the Soviet Union broke up into independent constitutional democracies. (That victory is treated officially as a failure in Russia today.)

II. 1990s: Fusing the Europes

However, these tectonic changes also shattered our theories delineating “different” Europes. Since all nations East of West have made the transformation we once thought would be unique to Central Europe alone, *the “three Europes” have again disappeared from the map*. The emergence of the widest possible Europe potentially united in democracy has seemingly validated all the posh convergence theories that interestablishment conference-goers had put forth for decades.

I can demonstrate formal proof of that convergence around the Western model. The organization I served in the 2000s, the OSCE,¹ is typical fruit of the high expectations of the 1990s. It was born from the détente handshake between NATO and the Warsaw Pact in Helsinki in 1975. However, freedoms such as the right to free elections, free civil society, and free speech had been painfully missing from the Helsinki process, and were only acknowledged in the 1990s by all OSCE participating states. These rights, indeed, are now embodied in intergovernmental human rights watchdog institutions such as mine.

Of course, spectacular discrepancies in the newly democratized Eurasian space still exist. The former Soviet Republic of Turkmenistan, for example, has no privately owned press, while the Western democracies have no taxpayer-paid media, except for their public service broadcasters. That resembles, on the surface, the East–West differences familiar from 20 years ago. But given the formal commitments on freedom of expression, freedom of the media, and freedom of information—standards that all OSCE nations have accepted—these diversities comprise a substantially different situation compared to the “poles apart” divide in legitimacy and expectations that existed before the 1989 constitutional landslide. Gone are the times when states in Eurasia mutually acknowledged the “inviolability” of “different social orders.”

Even the passionate routine by which the global free expression community critiques the status of media freedom in each country takes places within the framework of the nominal end of divisions.

¹ From 2004 to 2010, the author served as the Representative on Freedom of the Media for the 56-nation Organization for Security and Co-operation in Europe (OSCE).

Just imagine, in Freedom House's global beauty contest, at the moment Italy's media freedoms receive the same rating—"partially free"—as do Mongolia's! This tells more about the revolutionary equalization process between these distant nations than about what that particular achievement rating actually means. (And in my mind, in fact, "partly free" is philosophically the only viable rating for any democracy.) The upper and lower ends of such a category may be far removed from each other, but we certainly cannot claim that they are "civilizations" away.

III. 2000s: The Comeback of Three or Even Two Europes

Or—can we? The differences that we inherited would not count for much were the equalization course set and the convergence constant, even if piecemeal. But when we look in our hearts at the map, aren't we afraid and even convinced today that *the Three Europes are reemerging*? Or worse: hasn't the deterioration of our 20-year-old Central European media freedoms added speed to the steady drifting apart we have witnessed over the last ten years precisely in terms of speech and media freedoms, actually *reproducing the Two Europes, with parts of Central Europe unpredictably swinging between the free and unfree sides of the divide*?

How can we know? Defining these new conditions will not be as simple as erstwhile Cold War science. Back then, anyone was capable of approximately predicting a certain situation by simply looking at the underlying "systems." You knew for sure that a one-party system would give you no electoral choice and a one-party parliament. But today, Kazakhstan, for example, is a multiparty system—and yet it only depends on the mood of its supreme leader if an election is "devised" to yield a one-party parliament or some other parties are also allowed to climb over the threshold. Who knows? The 2014 elections in EU member Hungary may produce another "designer" vote.

IV. Hidden Maps of a Hemisphere: Pluralism

The only way to determine today if hidden maps are overwriting Europe's apparent unity is to list the discrepancies in how the universally shared standards are actually applied on the ground. So please brace for an aerial photograph revealing features that extend beyond national borders.

Why don't we start by looking at *pluralism*, the final product of media freedom, and at the same time its ultimate sustainer?

Going from West to East, one can observe a huge downward slope where media pluralism is concerned.

In *the West*, just as before the fall of the Wall, “consolidation” into ever-larger ownership blocks is the greatest threat, but this threat is for the most part handled by the regulators. Thanks to the European Union, the issues of media ownership and market share have become supranational on one level while remaining political issues at home. That provides some protection against monopolies, although, of course, it cannot exclude domestic anomalies, such as the Italian duopoly.

The situation in *Central Europe*, however, reminds us that variety is not enough to keep us happy. Anti-monopoly legislation works, and the full spectrum of opinion is accessible. Privatization is complete and state ownership of the media is over; independent public service television exists, though it is far from healthy.

Before focusing on the limitations of this nominally happy “Westernization,” its scope has to be further reduced by admitting that not even denationalization and demonopolization are universal in Central Europe anymore. In 2010, under Prime Minister Viktor Orbán, Hungary officially turned towards a government-supervised and -guided media regime. He was able to legally and even constitutionally force through a post-Soviet type media governance, undisturbed by the incredulous dismay of the European Union, of which Hungary had been a model pupil in instituting speech rights. Orbán’s coup is so openly miming Putin’s counterrevolution that it will be easier to describe its effect on media pluralism when we reach the post-Soviet portion of Europe’s media landscape.

Returning to the Central European limitations of Westernization, one could have read the warning signs even before Orbán’s coup. The press, and increasingly television as well, while demonopolized, has over the two democratic decades become increasingly partisan or even party-owned; a growing number of media outlets are alibi investments and status symbols of personal power. Silvio Berlusconi’s Italian model has many followers, in that media magnates aim at political influence, the actual creation of political parties, or both. Especially in smaller nations, an overcrowded, preconsolidation market is the current norm (while many states, especially in the Balkans, represent so tiny a market that they would have trouble sustaining a media industry even after a healthy collapse). Journalism, therefore, when not utterly commercial, is utterly partisan: judgmental, contrarian, a constant competition of blistering adjectives, slanted invective, and spin wars. In one word, Central Europe has a type of media pluralism that I would call *neo-Weimarian*, after the famously confrontational mentality of the pre-1933 German democracy.

Twenty years after the exemplary handshake transitions that led to liberal democracy, Central Europe’s otherwise pluralistic media is not able or willing anymore to cultivate (as it did in the years of the change) common ground as well as disputes. The freedom to fight has overwhelmed the freedom to understand and agree.

Under such circumstances, foreign ownership of the local press, provided it is nicely diversified—and it mostly is—is a blessing! Central Europe's media have been rescued from landing in the hands of local, parochial, nonmedia investors only thanks to foreign owners. Even if somewhat on the depoliticizing side, foreign-owned media are the safe haven from *Weimarization*. (Actually, *Balkanization* is an equally familiar expression to describe the fragmentation into antagonistic camps so typical for Eastern Europe's past predictatorial, prewar periods.) The foreign-owned outlets have never engaged in racist, extremist, or even tendentiously biased journalism. This is so probably not out of an innate idealism but out of the necessity to make money: the foreign owners, unlike local oligarchs, have to earn money through their media, too, and not just spend it on loss-making propaganda outlets.

This is where European Union membership counts, with its facilitation of both foreign ownership and its demonopolization. For Central Europeans, notwithstanding the questionable quality of their homegrown media, membership in the EU almost feels like being inside the West.

In the *former Soviet lands*, one sees a paradoxical Murphy's Law of pluralism. The more important a media type becomes in providing information, political choice, culture and indoctrination, the less pluralistic it is.

Across the post-Soviet subcontinent, there runs a wide and high sierra of *broadcast monopoly*—rising high, as mentioned, already in Central European Hungary. Except for the Baltic states, Ukraine and Georgia, nowhere in the former Soviet Union is there any substantial pluralism in television.

Both property- and content-wise, television is firmly in the hands of the state, or of friends and family members of government leaders. This is so regardless of whether television is state-owned outright or partly under private ownership; and regardless, too, of whether or not a (so-called) public service television exists.

Furthermore, the privately owned press and television are both in the hands of local nonmedia investors. The media oligarchs are, as a rule, those who *also* invest in the media. The very idea of foreign media ownership is treated by the governments of most of these states as treason.

Gigantic Russia, which could have allowed for a variety of television channels even via classic analog terrestrial transmission, has ended up with effectively only three nationwide channels, just as a country only a tiny fraction of its size might have. All three of these channels are state owned or state dominated. What's more, it is the state energy monopoly that has devoured the small amount of television variety that still existed in the first decade after the political changes. Dmitry Medvedev, the current Russian prime minister, used to be the chief of Gazprom and therefore was in command when Gazprom-Media in effect renationalized television. Under the three presiden-

cies he and Vladimir Putin were switching among themselves, the hold of the Kremlin on television has become only tighter.

Except for the Baltic states and some countries in the South Caucasus, Central Asian Kyrgyzstan is the only nation in the post-Soviet world that decided to establish public service television. But hardly had the law been adopted in 2008 when the president asked for an amendment that would hand over the nomination of all members of the board, as well as the right to pick the CEO, to him! This move in effect reverted the public service broadcaster into state-run television again, even before it could begin operation.

And this is exactly the “reform” that Viktor Orbán instituted in Hungary since 2010, not only in the public service board but for the entire broadcast regulatory authority. He now names the president of the almighty Media Council, and his party nominates all the five members.

No broadcast governance is independent in this region. All boards are dominated by the administration. The regulators are not mandated to license for pluralism. Licensing is an exercise in thinly veiled arbitrariness and nepotism. Ownership transparency is either not included in the law or is not enforced. Nominal owners don’t even deny they are only nominal.

Thanks to the changes that took place two decades ago, media pluralism does exist in the post-Soviet subcontinent, but at this point it is exiled into the financially fragile *independent print press*. Overshadowed by the lofty peaks of the broadcast media, these outlets form a barely noticeable line of austere, barren hillocks.

At the same time, there is a somewhat vaster line of hills occupying the landscape between the independent press and the broadcasters: *the state-owned press*. As a rule, the privatization of the print press is far from complete. A huge amount of taxpayer money is poured into the state- and municipality-owned print press. The post-Soviet states have long discovered the “grants for content” system, and new presidential decrees are constantly increasing the size of such payouts.

A growingly important domain of media governance is the channeling of advertisement revenues to the government-friendly and the state-owned papers. Advertisers’ business calculations are replaced by the government’s political logic of sustaining the behaving media and punish the unruly ones. The deeper is the dependence of the country’s general economy on benevolence of the government, the crueller are the anti-pluralistic effects of guided advertisement allocation. The state-owned enterprises are instructed which outlets are to be supported, and the privately owned industries simply do not dare to depart from the spending patterns of state enterprises; if they err, they are warned *telephonically*. Ensuing is a novel type of centrally planned party-state economy where the media market is thoroughly guided by the Government’s very visible hand, despite that legally it is still Adam Smith’s invisible hand that rules.

The independent print media suffer from a refined system of *administrative discrimination*. Distribution and subscription operations, including news and magazine kiosks, are run as monopolies in many nations. "Information ministries" and equivalent agencies, equipped with arbitrary decision-making powers, are firmly in control of registration procedures and all other aspects necessary for the survival of independent media outlets.

Belarus is a main inventor of the *bureaucratic harassments* that, in the space of the past decade, have decimated politically independent media outlets in countries to its east. The calculating methods employed by the importer countries include official registration of newspapers, making them subject to de facto official permission to publish, mandatory reregistration, and the government's right to warn and close down papers for "bad content."

As a result, the independent print media—oppositional by definition as well as by vocation—find itself in a situation analogous to that of Central Europe's samizdat before the 1989 change. All that's essentially missing is the pleasure we samizdat publishers felt in our role as a vanguard for free speech. Indeed, cutting off the independent press as source of feedback from civil society seems to be a more successful operation in many post-Soviet states than it was in late-communist Central Europe.

The Internet remains the only source of truly pluralistic information in the post-Soviet space; one can imagine it—for the purposes of our pluralism map—as a network of catchment basins that exists below the surface. But make no mistake: Internet freedom may only be enjoying a grace period in the plans of today's authoritarian rulers in Eastern Europe. Already, there is no ISP pluralism: one big state-controlled service provider per country is the norm. Despite romantic legends, without the legally secured competitive private ownership of ISPs, the Internet *can* be fragmented into nationally controlled spaces. State filtering and blocking is increasingly the fashion, as is the creation of arbitrary legal backing for it.

Higher Internet penetration, growing bandwidth, and the ensuing abundance of communication channels may eventually end up being the transformation that renders the current monopolization of the media futile. For now, however, it is still the guided broadcasting scene that defines the level of media pluralism in the post-Soviet states (and Hungary).

V. Hidden Maps: Freedom of Journalism

The Three Europes are emerging right in front of our eyes again in many legal dimensions, not only those regarding media pluralism.

Take for example another West–East slope, the criminalization of journalists' mistakes. (I firmly believe that treating journalists' errors as crimes equals criminalization of journalism itself.)

In *Western Europe*, there is steady progress. Although not all national legal systems have officially abolished *criminal defamation and libel*, all states have managed to adhere to the rulings of the European Court of Human Rights and have in the last decade relegated disputes over journalistic offenses to the civil courts.

In contrast, *Central European countries* frequently apply criminal libel. And double penal and civil procedures directed against journalists by plaintiffs who are public figures make this part of Europe a lawyers' paradise. There is total chaos, moreover, regarding which statements constitute opinion and which constitute fact, or whether a fact is a mere personality issue or rather of "public interest". But after we free speech advocates made the predictable noise, caution is applied in one regard: the criminalized journalists at least no longer end up in prison for what they write. Instead, lawyers of offended politicians use criminal convictions of offending journalists to go to civil courts which can use the crime verdict as evidence and collect more fines more safely.

In *the East*, however, laws that criminalize journalistic errors are in full vigor, and they are the main source of incarceration of journalists who write critically about the authorities. At the moment, Turkey has taken from Azerbaijan the inglorious title of the country with the most journalists in prison in the northern hemisphere. In Russia, President Dmitry Medvedev decriminalized defamation in his tenure's last year, 2011, but President Putin recriminalized it within less than a year, right after taking back the Presidency.

Thirteen countries in the wider Europe have officially decriminalized "defamation," and the list is remarkably—and pleasantly—unpredictable: Armenia, Bosnia, Cyprus, Estonia, Georgia, Ireland, Kyrgyzstan, Moldova, Montenegro, Romania, Ukraine, the UK, and Tajikistan. Unfortunately, the success rate of an equally important reform, "civilizing" *civil-law defamation*, is less unpredictable. There clearly exist three Europes in terms of application of the *public interest test*, required by the European Court of Human Rights when adjudicating civil-law complaints of politicians against journalists. In *several post-Soviet states*, devastatingly high fines for "violating personality rights" of public figures have taken up the role that criminal defamation had played in deterring free speech. In some countries, even public institutions sue journalists for defaming them with their critical stories, despite that (in order to uphold uninhibited public debate) the European Court of Human Rights denies a litigable dignity from public entities.

In *Central Europe*, the crucial ECHR "public interest" standard, prescribing a higher threshold for offence (a diminished personality protection) for public figures, did trickle down in the last decade. But Hungary, here again, is a Central European pioneer in going backward. In 2013, the ruling party passed Europe's most severe defamation law that punishes even the preparation of a factually untrue voice or video with the intention to offend anyone. The mere storage of such recording on the creator's hard drive is pun-

ishable by imprisonment for up to one year; granting access to any other person may be punished with two years' prison; and if disclosure is made to a large public, the sanction may be increased to three years of imprisonment (*Criminal Code* 226/A-B). Polgári törvénykönyv 2:44. § [Közéleti szereplő személyiségi jogának védelme])

VI. Hidden Maps: Freedom of Information

Or, take *access to information* laws. As an acknowledgment of new times, basic freedom of information laws have by now been pretty much adopted universally. But the application of these nice, modern principles is a different matter, another West–East tilt.

In *the West*, you won't find “breach of secrecy” trials against journalists; it is commonly acknowledged that citizens in general—and journalists, in particular—are not obliged to keep official secrets. The typical Western trouble for journalists is not “breach of secrecy” but “protection of sources.” But the outcome of trials on this charge has led to a more secure freedom of information, because nervous prosecutors who would like to hammer on journalists in order to plug the leaks find their cases rejected by judges, constitutional courts, and even Parliaments.

According to a survey that my OSCE office conducted in 2007, in none of the postcommunist countries did the law on breach of secrecy differentiate between the liability of official guardians of state secrets and that of civilians, including journalists. However, the situation by today is not of two Europes, but three of them again. The situation of *investigative journalism* is insecure in both Central and Eastern Europe, but in a very different degree.

Since 2007, some jurisdictions in *Central Europe* have incorporated public interest waivers into their secrecy laws. In spite of which, *unlike in Western Europe*, a good number of secrecy trials against leak-publishing outlets and journalists take place every year.

But in *post-Soviet Europe* we find a situation that, at first glance, is something of a surprise: no “breach of secrecy” cases have been initiated in the last decade, despite the draconian *laws in force against such activity by the media*. The only one I could find (the case of journalist Ramazan Yesergopov) occurred in 2008 in Kazakhstan, and the accused received a severe prison sentence for leaking documents in a piece that criticized the secret services.

It may then seem that Edward Snowden, the badly wanted US secret-leaker, when he requested asylum in Russia in 2013, was headed for a veritable journalists' paradise where journalists are not prosecuted for airing official secrets. However, the reason for the lack of such trials in the East is, I am afraid, that investigative journalism is stopped not in the legal arena but by direct, brutal intimidation. The most dramatic, distinctiveness of the back-

ground in Eastern Europe is the *massive violence against journalists, especially in the Russian Federation*. This is no longer merely a slope that slides eastward, this is a veritable abyss. It is the criminalization of journalism and the official disregard for media rights that prepared the ground for this plague, and a practical impunity that perpetuates it. I have to pay tribute here to the indescribable heroism of Russian journalists who, at the risk of their lives, still dare to go after stories on corruption or human rights abuses.

VII. The “Post-Color” Counterrevolution

You may ask: Is the consistently dismal post-Soviet landscape of media freedoms a growing trend, or just a holdover from the past? There is no question about it: Eastern Europe’s budding media pluralism, just as the working conditions for civic journalism in Central Europe, has deteriorated over the past decade. Post-Soviet government monopoly of television, for example, is only becoming more firmly cemented with each passing year.

However, unlike the unplanned, chaotic “*Weimarization*” of the Central Europe scene, which may be caused by fierce competition of political forces but can be self-curing over time as civility takes over, the deterioration of press freedoms and media governance in the countries of the former Soviet Union is being effected by a coherent, strategic top-down policy on the part of the governing elites. The fact that EU member state Hungary has also applied several patterns of post-Soviet neo-authoritarian governance, demonstrates that spoiling of postcommunist freedom can go from Weimarian to illiberal regardless of geographical longitude. War and totalitarianism perhaps can be checked by the post-Yalta European order, but—just like between the two World Wars—absolute fight for political gain is still conducive to absolute power grab.

I call the freshest trend of illiberal power grab the “*postcolor*” *counter-revolution*. Its principal targets are the independent media and independent civic associations. Vladimir Putin is the chief philosopher of this counterreformation that is both planned and reactive. His propaganda that portrays the first postcommunist decade as pure failure could be merely seen a postmodern political maneuver, were it not for the labeling of that period of openness as a sell-out. A sell-out to whom? Yes, to the reinvented enemy, “the West”! The pendulum move does not go as far as to fully rebuild a wall to block the West out. It is “*nasha demokratiya*” (our democracy) versus “*ikh demokratiya*” (their democracy), that is, differentiating managed illiberal democracy from the messy liberal democracy promoted by the West. That antagonization does not go as far as the past duality distinguishing the “true” or “proletarian” democracy from the “fake” or “bourgeois” one. Still, this distinction is also built on ideological systems—this time not on Marxism, but on the vague notions of constitutional and cultural relativism.

The “color revolutions” that came after 1989 were belated, second-wave liberalizations that took place wherever civil society became strong enough to try and transform lingering illiberal democracies into more pluralistic ones. In effect, they used the 1989 changes in Central Europe as a model. The first “color revolution” was launched in Belgrade against Slobodan Milošević’s regime in 2000. Similar movements followed suit in 2003 in Georgia, 2004 in Ukraine, and 2005 in Kyrgyzstan. Their main catalyst was popular indignation over stolen elections, and yes, over censorship; their main weapons were protracted occupational demonstrations.

The counterreformers clearly understood that a main facilitator of reliberalizing change was the presence of at least one free broadcast channel—such as B92 in Serbia, Rustavi 2 in Georgia, and Channel 5 in Ukraine. Vladimir Putin mercilessly turned what he learned from the lesson into a final devastation of media pluralism in 2014, in the days of Crimea’s annexation. Russia’s last independent-minded broadcast studio, Dozhd TV, was shut out from the cable networks, and the ISP’s of Russia were ordered to block access to the website of the only independent radio, Ekho Moskvy. The long fight of Hungary’s Media Council against Klubrádió, the only independent talk station left, is also motivated by this autocrat’s wisdom. Restricting media pluralism and vilifying international civil cooperation has become a form of shared technology among the governments in the post-Soviet world.

VIII. An Optimistic Conclusion

In conclusion, I have to answer my own tacit questions: Is the reemergence of the three regions on the map of Europe’s freedom of speech the result of a stubborn societal consistency that is intractable for the idealistic cause of liberties? Are we mapping the limits of progress when we perceive those three Europes as still persisting, or once again separate? The relapse we see—to society’s Weimarization in the region from the Czech Republic to Ukraine, and to a Cold War Light anti-Western counterrevolution in the post-Soviet space and even in a new EU member state—a setback in the cultural genes of those places, or is it man-made?

Twenty-five years later, my answer is still optimistic, but with an important caveat. The first ten years after the Cold War proved that pluralist democracy and free expression either already are or can become the ideal and the objective of civil society in all of the postcommunist world. I am still convinced that the neo-authoritarian structures we see emerging in the second postcommunist decade are not culturally determined systemic relapses, but freshly forged authoritarian political schemes usurping democracy’s technology. Therefore the European and worldwide liberal democratic community should meet them with reinforced universalism. Some Cold

War-ishness could be of good use on the liberal democratic side as well, in terms of opposing ideologically, not just tactically, the applied relativism of the new authoritarians. Support for media pluralism and civil society should not be abandoned, and vocal, undiplomatic criticism of governmental deviations from democratic standards should not be shunned just because the neo-authoritarians like to refer to historical and cultural differences. They should not be excused based on one-off acts of democratic legitimacy—elections, custom-tailored constitutions, referenda—which the postcommunist authoritarians utilize to eradicate media pluralism, streamline the news world, eliminate independent civil activities, and penalize the international cooperation of NGOs.

I do not deny that the last ten years of backlash, and even growing oppression in Central and Eastern Europe, has erected fences along old lines. But these can become new walls only if seen as “natural.” A slow pace of crystallization of a liberal democratic consensus, and an initial weakness of civil society are inevitable in the new democracies of Central and Eastern Europe, but that should not be allowed to justify the substitution of the rule *of* law with rule *by* law. The unification of Europe under democratic principles a quarter century ago should not be let to serve as a disguise for the new autocrats while pursuing their goals—it also should oblige Europe’s liberal democratic community to keep theirs, regardless of re-emerging map lines, marked or hidden ones.

Freedom of Expression, Media and Journalism under the European Human Rights System: Characteristics, Developments, and Challenges¹

DIRK VOORHOOF

I. Introduction

All parliamentary democracies in Europe guarantee freedom of expression and media freedom in their constitutions, media laws or human rights acts. The practice and application of freedom of expression and information, however, has often been, and to some extent still is, problematic. In some periods of time and specifically in the areas of state security, public order, the reputation of public persons and in the domain of morals and religion, the right to freedom of expression has not always been respected by governments, executive bodies or judicial authorities. Still the general tendency is that the scope and level of protection of freedom of expression and information has been extended and upgraded over the years in Europe and that public authorities have been less involved in prior restraint, censorship and oppression.²

¹ This chapter is an abbreviated and substantially updated version of D. Voorhoof, “Freedom of Expression under the European Human Rights System: From *Sunday Times* (n° 1) v. UK (1979) to *Hachette Filipacchi Associés* (‘Ici Paris’) v. France (2009),” *Inter-American and European Human Rights Journal/Revista Interamericana y Europea de Derechos Humanos* (2009) 1-2: 3–49. It integrates references to case law of the European Court of Human Rights until May 2014. For an analysis of the freedom of expression under the Inter-American human rights system, see C. Grossman, “Challenges to Freedom of Expression within the Inter-American System: A Jurisprudential Analysis,” *Human Rights Quarterly* 34 (2012): 361–403 and the chapter of Catalina Botero Marino in this book: “Jurisprudential Advances and Persistent Challenges for Freedom of Expression in the Americas.”

² Internet regulation, filtering and surveillance related to the war on terror shows a tendency, however, to reduce some areas of freedom of expression and media free-

The right to freedom of expression and information is actually guaranteed by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, “the European Convention,” or “the Convention”) in all 47 member states of the Council of Europe, from Norway to Cyprus, from Iceland to Azerbaijan and from Portugal to Russia.³ The development toward more freedom of speech and media freedom in (most of) the Council of Europe member states has undoubtedly been influenced by the expanding impact of Article 10 of the Convention which guarantees freedom of expression “without interference by public authority” and “regardless of frontiers.”⁴ The way Article 10 of the Convention has been interpreted and applied by the European Court of Human Rights (ECtHR) and has been promoted by the Council of Europe has manifestly helped to upgrade and improve the level of freedom of expression and media freedom in countries that became member states of the European Convention after the fall of the Berlin Wall (9 November 1989), such as the Baltic states (Estonia, Lithuania and Latvia), the Czech Republic and Slovenia.⁵ But also in countries that already had a long-standing constitutional and democratic tradition, the right to freedom of expression and information has been broadened, strengthened, updated and upgraded under the influence of Article 10 of the European Convention, especially regarding discussions on matters of public interest, in protecting newsgathering activities and journalistic sources, whistleblowing, access to public documents, media pluralism and Internet freedom. In other Council of Europe member states that have less solid democratic institutions or that have experienced growing pains as they have moved toward democracy (such as in Armenia, Azerbaijan, Georgia, Hungary, Moldova, Russia, Serbia, Turkey and Ukraine), the issue of press freedom and freedom of (political) expression is still very problematic. Article 10 of the Convention has become a crucial instrument, however, to motivate, to stimulate or even to compel the national authorities of these countries to abstain from interfering

dom in Europe since 11 September 2001. See D. Banisar, *Speaking of Terror: A Survey of the Effects of Counter-Terrorism Legislation on Freedom of the Media in Europe* (Strasbourg: Media and Information Society Division, Directorate General of Human Rights and Legal Affairs, Council of Europe, 2008), and S. Sottiaux, *Terrorism and the Limitation of Rights: The ECHR and the US Constitution* (Oxford: Hart Publishing, 2008), 67–152. For a global and updated overview, see Unesco, *World Trends in Freedom of Expression and Media Developments* (Paris: Unesco Publ., 2014), <http://unesdoc.unesco.org/images/0022/002270/227025e.pdf>.

³ For more information about the Council of Europe, see www.coe.int.

⁴ For more information about the European Convention (signed on 4 November 1950), see <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG>.

⁵ See the positive developments in these countries reflected in the press freedom indexes of Reporters without Borders and Freedom House.

in freedom of speech and press freedom, to respect freedom of public debate, political expression and critical journalism to a higher degree and to promote media pluralism and Internet freedom.

II. Freedom of Expression and the European Court of Human Rights

Article 10 of the European Convention reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 10(1) stipulates the principle of the right to freedom of expression, while Article 10(2), by referring to “duties and responsibilities” that go together with the exercise of this freedom, opens the possibility for public authorities to interfere with this freedom by way of formalities, conditions, restrictions and even penalties. Yet, the main characteristic of Article 10(2) is precisely that, by imposing the so-called “triple test,” it substantially reduces the possibility of interference with the right to express, receive and impart information and ideas. Interferences by public authorities are only allowed under the strict conditions that any restriction or sanction must be “prescribed by law,”⁶ must have a “legitimate aim” and finally and most decisively, must be “necessary in a democratic society.”

⁶ In only a few cases the Court came to the conclusion that the condition “prescribed by law,” which includes foreseeability, precision and publicity or accessibility and which implies a minimum degree of protection against arbitrariness, was not fulfilled, such as in ECtHR 24 September 1992, Case No. 10533/83, *Herczegfalvy v. Aus-*

This analysis will focus on some of the characteristics of the case law developed by the European Court of Human Rights applying Article 10 of the Convention.⁷ The European Court's case law over a period of 35 years⁸ illustrates how the Court's jurisprudence has manifestly helped to create an added value for the protection of freedom of expression, journalistic freedom, freedom of the media and public debate in the member states of the Convention.⁹

tria; ECtHR 23 September 1998, Case No. 24838/94, *Steel and Others v. UK*; ECtHR 25 November 1999, Case No. 25594/94, *Hashman and Harrup v. UK*; ECtHR 14 March 2002, Case No. 26229/95, *Gawęda v. Poland*; ECtHR 25 January 2005, Case Nos. 37096/97 and 37101/97, *Karademirci and Others v. Turkey*; ECtHR 17 January 2006, Case No. 35083/97, *Goussev and Marenk v. Finland*; ECtHR 17 January 2006, Case No. 36404/97, *Soini and Others v. Finland*; ECtHR 18 July 2006, Case No. 75615/01, *Štefanec v. Czech Republic*; ECtHR 27 September 2007, Case No. 30160/04, *Dzhavadov v. Russia*; ECtHR 17 June 2008, Case No. 32283/04, *Meltex Ltd. and Mesrop Movsesyan v. Armenia*; ECtHR Grand Chamber 14 September 2010, Case No. 38224/03, *Sanoma Uitgevers BV v. The Netherlands*; ECtHR 29 March 2011, Case No. 50084/06, *RTBF v. Belgium*; ECtHR 5 May 2011, Case No. 33014/05, *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*; ECtHR 25 October 2011, Case No. 27520/07, *Akçam v. Turkey*; ECtHR 18 December 2012, Case No. 3111/10, *Ahmet Yildirim v. Turkey* and ECtHR 25 June 2013, Case No. 48135/06, *Youth Initiative for Human Rights v. Serbia*.

⁷ The 47 member states that at present have ratified the Convention are Albania, Andorra, Austria, Armenia, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom. More than 800 million people are actually living under the protection of the European Convention on Human Rights and Fundamental Freedoms, as a "minimum rule" of human rights protection (Art. 53 ECHR). In the (near) future the European Union (EU) will accede to the ECHR as well, bringing the acts and action of the EU under the scrutiny of the ECtHR. This process of accession is now in a final stage: European Union Treaty, Article 6(2) and Council of Europe Protocol No. 14, Article 17.

⁸ The case law analyzed in this article focuses on the European Court's jurisprudence since April 1979 (ECtHR 26 April 1979, Case No. 6538/74, *Sunday Times (n° 1) v. UK*, the first judgment in which the Court found a violation of Article 10) until May 2014 (ECtHR 15 May 2014, Case No. 19554/05, *Taranenko v. Russia*). All together nearly a thousand judgments related to Article 10 ECHR, freedom of expression, media and journalism.

⁹ Other institutions and instruments of the European Convention on Human Rights and the Council of Europe play an important role in monitoring and enforcing freedom of expression as guaranteed under Article 10 ECHR, such as the Committee of Ministers' supervision of the execution of the Court's judgments (www.coe.int/t/dghl/monitoring/execution/default_en.asp) and the Commissioner of Human Rights, who plays a prominent role in promoting and monitor-

Article 10 of the Convention as interpreted by the European Court has substantially contributed to the guarantee of a higher level of protection of freedom of expression in addition to the constitutional protection in the member states and complementary to other international treaties protecting freedom of expression and information.¹⁰

An important aspect that has helped to develop and enforce this right is the strict scrutiny by the European Court of interferences by national authorities in freedom of expression on matters of public interest, and especially regarding the freedom of political expression and the role of the press as “public watchdog.” The recognition by the European Court of a horizontal

ing respect for human rights in the Council of Europe’s member states (www.coe.int/t/commissioner/default_en.asp). By promulgating resolutions, declarations and recommendations, the Parliamentary Assembly, the Committee of Ministers, and the ministers responsible for media and new communication services promote the awareness and develop guarantees for securing freedom of expression, e.g., in relation to court reporting, protection of journalistic sources, access to official documents, the right to reply, public service media, independent regulatory authorities in the media sector, media pluralism, coverage of election campaigns, the media in the context of the fight against terrorism, blasphemy, religious insult, hate speech and the application of freedom of expression principles on the Internet and the new media environment. Aspects of freedom of expression are also reflected in and guaranteed by some Council of Europe Conventions, such as the Revised European Convention on Transfrontier Television (ECTTV, CETS nr. 32) and the European Convention on Access to Official Documents European (CETS nr. 205). The Council of Europe also promotes professional standards in the media and self-regulatory formats stimulating journalistic ethics or respecting ethical and basic democratic values on the Internet and in the new media and in online media environments. For more information, see the website of the Council of Europe on Media and Information Society (www.coe.int/t/dghl/standard-setting/media/) and of the Steering Committee of Media and Information Society (CDMSI) (www.coe.int/t/dghl/standardsetting/media/CDMSI/default_en.asp). See also: www.obs.coe.int/oea_publ/legal/ebook_committeeministers-coe.pdf.en and www.obs.coe.int/oea_publ/legal/ebook_ParliamentaryAssembly.pdf.en.

¹⁰ Exceptionally, constitutional law or international treaties guarantee freedom of expression to a higher level: e.g., Articles 19 and 25 of the Belgian Constitution prohibiting prior restraint (see also ECtHR 29 March 2011, Case No. 50084/06, *RTBF v. Belgium*) and Article 19 of the UN Covenant on Civil and Political Rights (ICCPR), guaranteeing freedom of expression, including the freedom “to seek” information and ideas. Article 19 ICCPR also explicitly guarantees the freedom of expression “in the form of art.” See also General Comment No. 34, Article 19: Freedoms of Opinion and Expression, CCPR/C/GC/34, UNHRC 2011, <http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>. Article 11 of the Charter of Fundamental Rights of the European Union guarantees “the freedom and pluralism of the media.” See also Council of the European Union, *EU Human Rights Guidelines on Freedom of Expression Online and Offline*, 12 May 2014, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/142549.pdf

effect¹¹ of Article 10 and of the positive obligations for member states to protect the right to freedom of expression¹² has further extended the scope of the right to freedom of expression in Europe. Another important factor that contributes to a substantial and sustainable impact of Article 10 is the high level of protection the Court has recognized vis-à-vis journalistic sources, whistle-blowers, gathering of news and information, and more recently, the right of access to information held by public authorities and freedom of expression and information in online media and access to the Internet. The Court has significantly upgraded freedom of expression of individuals, journalists, artists, academics, opinion leaders, NGOs and activists regarding their rights to receive, gather, express and impart information contributing to public debate in society. In a judgment of 25 June 2013 in the case of *Youth Initiative for Human Rights v. Serbia*, for instance, the European Court of Human Rights has reaffirmed the importance of NGOs acting in the public interest: “[W]hen a non-governmental organization is involved in matters of public interest, such as the present applicant, it is exercising a role as a public watchdog of similar importance to that of the press.”¹³ In *Ahmet Yildirim v. Turkey* the Court has explicitly recognized the right of individuals to access the Internet. In its ruling against the blocking of online content (on Google Sites), it asserted that the Internet has now become one of the principal means of exercising the right to freedom of expression and information.¹⁴

¹¹ The ECtHR at several occasions has made it clear that Article 10 ECHR can also be applied in private legal relationships and it has repeatedly assessed interferences by private persons in the light of Article 10 § 2 ECHR: ECtHR 29 February 2000, Case No. 39293/98, *Fuentes Bobo v. Spain*; ECtHR 6 May 2003, Case No. 44306/98, *Appleby a.o. v. UK*; ECtHR Grand Chamber 30 June 2009, Case No. 32772/02, *Verein gegen Tierfabriken Schweiz (VGT) (n° 2) v. Switzerland*; ECtHR 16 December 2008, Case No. 23883/06, *Khursid Mustafa and Tarzibachi v. Sweden*; ECtHR 16 July 2009, Case No. 20436/02, *Wojtas-Kaletka v. Poland*; ECtHR 21 July 2011, Case No. 28274/08, *Heinisch v. Germany*; ECtHR Grand Chamber 12 September 2011, Case Nos. 28955/06, 28957/06, 28959/06, 28964/06, *Palomo Sánchez a.o. v. Spain*; ECtHR 6 October 2011, Case No. 32820/09, *Vellutini and Michel v. France*; ECtHR 10 May 2012, Case No. 25329/03, *Frasila and Ciocirlan v. Romania*; ECtHR 10 January 2013, Case No. 36769/08, *Ashby Donald a.o. v. France* and ECtHR 16 July 2013, Case no. 1562/10, *Remuszko v. Poland*.

¹² ECtHR 16 March 2000, Case No. 23144/99, *Özgür Gündem v. Turkey*; ECtHR Grand Chamber 7 June 2012, Case No. 38433/09, *Centro Europa 7 S.R.L. and Di Stefano v. Italy* and ECtHR 25 June 2013, Case No. 48135/06, *Youth Initiative for Human Rights v. Serbia*.

¹³ ECtHR 25 June 2013, Case No. 48135/06, *Youth Initiative for Human Rights v. Serbia*. See also ECtHR 28 November 2013, Case No. 39534/07, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria*.

¹⁴ ECtHR 18 December 2012, Case No. 3111/10, *Ahmed Yildirim v. Turkey*. See also ECtHR 10 March 2009, Case Nos. 3002/03 and 23676/03, *Times Newspapers Ltd. (n° 1–2) v. UK*.

However, some restrictive trends in the approach of the Strasbourg Court have been identified, especially in a number of Grand Chamber judgments. The outcome and rationale of some judgments in which the Court has found no violation of the right to freedom of expression have raised concerns regarding the (future) level of protection of press freedom in Europe compared to the “traditional” high standards of the Strasbourg case law in this matter.¹⁵ A similar concern is also reflected in dissenting opinions in annex to some recent judgments finding no violation of Article 10 of the Convention.¹⁶ One dissenting opinion is very illustrative in this context. The

¹⁵ See the proceedings and conclusions of the Seminar on the European Protection of Freedom of Expression: “Reflections on Some Recent Restrictive Trends,” Strasbourg, 10 October 2008, www-ircm.u-strasbg.fr/seminaire_oct2008/index.htm. See also R. Ó Fathaigh and D. Voorhoof, “The European Court of Human Rights, Media Freedom and Democracy,” in M. Price, S. Verhulst, and L. Morgan, eds., *Routledge Handbook of Media Law* (New York: Routledge, 2013), 107–124.

¹⁶ See, e.g., ECtHR Grand Chamber 22 October 2007, Case Nos. 21279/02 and 36448/02, *Lindon, Otchakovsky-Laurens and July v. France*, in which the dissenting judges express the opinion that the Court’s judging no violation of Article 10 of the Convention is “a significant departure from the Court’s case-law in matters of criticism of politicians.” In *Stoll v. Switzerland* (ECtHR Grand Chamber 10 December 2007, Case No. 69698/01) the dissenting opinions consider the Court’s judgment by finding no violation of Article 10 “a dangerous and unjustified departure from the Court’s well established case-law concerning the nature and vital importance of freedom of expression in democratic societies.” In *Féret v. Belgium* the dissenting judges also firmly argue why they disagree with the majority of the Court not finding a violation of Article 10 regarding the conviction for “hate speech” of the leader of a political party. The dissenting judges express the opinion that by confirming the criminal repression of political debate in this case, the Court neglects the essence of freedom of expression: “confirmer la répression pénale du discours politique en l’espèce va à l’encontre de la liberté d’expression” (ECtHR 16 July 2009, Case No. 15615/07, *Féret v. Belgium*). See also the dissenting opinions in ECtHR 29 July 2008, Case No. 22824/04, *Flux (n° 6) v. Moldova*; ECtHR 17 February 2009, Case No. 38991/02, *Saygili and Falakaoğlu (n° 2) v. Turkey*; ECtHR 24 February 2009, Case No. 46967/07, *C.G.I.L. and Cofferati v. Italy*; ECtHR 4 June 2009, Case No. 21277/05, *Standard Verlags GmbH (n° 2) v. Austria*; ECtHR 16 July 2009, Case No. 10883/05, *Willem v. France*; ECtHR 31 May 2011, Case No. 3699/08, *Žugić v. Croatia*; ECtHR Grand Chamber 12 September 2011, Cases nos. 28955/06, 28957/06, 28959/06 and 28964/06, *Palomo Sánchez a.o. v. Spain*; ECtHR 26 June 2012, Case No. 12484/05, *Ciesielczyk v. Poland*; ECtHR 25 September 2012, Case No. 11828/08, *Trade Union of the Police in the Slovak Republic and Others v. Slovakia*; ECtHR 9 October 2012, Case No. 29723/11, *Szima v. Hungary*; ECtHR 11 December 2012, Case No. 35745/05, *Nenkova-Lalova v. Bulgaria*; ECtHR 10 October 2013, Case No. 26547/07, *Print Zeitungsverlag GmbH v. Austria*; ECtHR 30 January 2014, Case No. 34400/10, *De Lesquen du Plessis-Casso (n° 2) v. France* and ECtHR 4 February 2014, Case No. 11882/10, *Pentikäinen v. Finland* (referred to Grand Chamber). See also some of the earlier dissenting opinions in ECtHR Grand Chamber 17 December

dissenting judges of the European Court, being confronted with a controversial finding of a non-violation of Article 10 by the majority in the case *Barata Monteiro da Costa Nogueira and Patrício Pereira v. Portugal*, point at a worrying trend, the Court's supervisory role scrutinizing fundamental rights and freedoms in Europe actually being under attack.¹⁷ The essential message of the dissenters is that the finding of the majority in this case contributes to the weakening of the philosophy of freedom of expression itself. It emphasizes that at a time when the winds are changing, it is the Court's task, more than ever, to reinforce freedom of expression and information as a key element in democracy.¹⁸ Again on 13 July 2012 a robust dissenting opinion was added to a Grand Chamber judgment in the case *Mouvement raëlien suisse v. Switzerland*. The dissenters obviously disagree with the Court's majority, finding no violation of Article 10, this time in a case concerning a ban imposed by local authorities on a poster campaign of an association, allegedly promoting unlawful activities on their website. The dissenting opinion seems to deplore the lack of protection guaranteed to freedom of expression, leaving too wide a discretion for interpretations of limitations and restrictions, combined with a too broad margin of appreciation left to the domestic authorities interfering with freedom of expression and information within their jurisdiction. The dissenting judges again focus on the importance of freedom of expression in a democracy: "The right to freedom of expression under Article 10 is an essential provision because it underpins the democracy that lies at the heart of the Convention. Any restriction of that freedom must be strictly justified by a pressing social need and narrowly circumscribed by relevant and sufficient reasons."¹⁹ Also the case *Animal Defenders International v. UK*²⁰ shows

2004, Case No. 49017/99, *Pedersen and Baadsgaard v. Denmark*; ECtHR 13 September 2005, Case No. 42571/98, *I.A. v. Turkey*; ECtHR 24 November 2005, Case No. 53886/00, *Tourancheau and July v. France* and ECtHR 14 June 2007, Case No. 71111/01, *Hachette Filipacchi Associés v. France*.

¹⁷ See the discussions related to the Brighton Declaration on the Future of the European Court of Human Rights (20 April 2012): <http://hub.coe.int/20120419-brighton-declaration> and www.justice.org.uk/data/files/Joint_NGO_input_to_the_ongoing_negotiations_on_the_draft_Brighton_Declaration_FINAL_with_logos.pdf.

¹⁸ Dissenting opinion of Tulkens, Popović, and Sajó in ECtHR 11 January 2011, Case No. 4035/08, *Barata Monteiro da Costa Nogueira and Patrício Pereira v. Portugal*. See also D. Voorhoof, "Tulkens on the Barricades of Freedom of Expression and Information," *Strasbourg Observers* blogpost, 24 August 2012, <http://strasbourgobservers.com/2012/08/24/tulkens-on-the-barricades-of-freedom-of-expression-and-information/>.

¹⁹ Dissenting opinion of Tulkens, Sajó, Lazarova Trajkovska, Bianku, Power-Forde, Vučinić, and Yudkivska in ECtHR Grand Chamber 13 July 2012, Case No. 16354/06, *Mouvement raëlien Suisse v. Switzerland*.

²⁰ ECtHR Grand Chamber 22 April 2013, Case No. 48876/08, *Animal Defenders International v. UK*.

a striking difference of opinion among the Strasbourg judges, the Grand Chamber holding, by nine votes to eight, that the UK's ban on political advertising on television did not violate Article 10 of the Convention. Essentially, the majority of the judges accepts that a total ban on political advertising on television, characterized by a broad definition of the term "political," with no temporal limitations and no room for exceptions, not even for a TV advertisement by an NGO raising awareness on animals rights and contributing to a public debate on animal protection, is in accordance with the right to freedom of political expression. The dissenting judges argued for a radically different approach, even pointing at the "double standard within the context of a Convention whose minimum standards should be equally applicable throughout all the States parties to it," but their arguments could not convince the majority of the Grand Chamber.²¹

The (near) future will show whether the European Court of Human Rights will keep on playing its role as ultimate guarantor of human rights in Europe and will be able to stand firm against the political pressure that has been felt the last few years surrounding the legitimacy and supervisory role of the European Court in securing human rights in the member states. This context may go some way in explaining the shift in direction surrounding the protection of freedom of expression and press freedom by the European Court in some of its judgments.²² However, surveying the Court's jurisprudence of the last years shows that the Court's case law related to Article 10 of the Convention is still maintaining high standards of freedom of expression, media pluralism and protection of journalists, hence obliging member states to secure within their jurisdictions a higher threshold of freedom of expression and information. The Grand Chamber judgments of 7 February 2012 in *Axel Springer AG v. Germany* and in *Von Hannover (n° 2) v. Germany*,²³ the recent findings of violations of Article 10 in several cases of protection of journalistic

²¹ After emphasizing being "perplexed" by the approach of the majority, one of the dissenting opinions concludes: "Nothing has been shown in this case to suggest that the state of democracy in the United Kingdom requires, by way of a 'pressing need,' the wide ban on paid 'political' advertisements that is in issue here; or that the said democracy is less robust than in other States parties to the Convention and cannot afford risk-taking with 'issue-advertising.' On the contrary, tradition and history force one to assert the very opposite."

²² See e.g. recently ECtHR 16 January 2014, Case No. 45192/09, *Tierbefreier e.V. v. Germany*; ECtHR 30 January 2014, Case No. 34400/10, *De Lesquen du Plessis-Casso n° 2) v. France*; ECtHR 4 February 2014, Case No. 11882/10, *Pentikäinen v. Finland* (referred to Grand Chamber) and ECtHR 29 April 2014, Case No. 23605/09, *Salumäki v. Finland*.

²³ ECtHR Grand Chamber 7 February 2012, Case No. 39954/08, *Axel Springer AG v. Germany* and ECtHR 7 February 2012, Case Nos. 40660/08 and 60641/08, *Von Hannover (n° 2) v. Germany*.

sources²⁴ and in a series of judgments in relation to critical reporting by media and investigative journalism²⁵ clearly illustrate the awareness of the European Court regarding the importance of freedom of expression and information in a democratic society. Especially the multiple references in the Court's recent case law to the danger of a "chilling effect,"²⁶ and its impact on the finding of unjustified interferences with media and journalists, help to secure a higher standard of freedom of expression and information through the interpretation

²⁴ ECtHR 15 December 2009, Case No. 821/03, *Financial Times Ltd. a.o. v. UK*; ECtHR Grand Chamber 14 September 2010, Case No. 38224/03, *Sanoma Uitgevers BV v. The Netherlands*; ECtHR 12 April 2012, Case No. 30002/08, *Martin a.o. v. France*; ECtHR 28 June 2012, Case Nos. 15054/07 and 15066/07, *Ressiot a.o. v. France*; ECtHR 22 November 2012, Case No. 39315/06, *Telegraaf Media Nederland Landelijke Media N.V. and Others v. The Netherlands*; ECtHR 18 April 2013, Case No. 26419/10, *Saint-Paul Luxembourg S.A. v. Luxembourg* and ECtHR 16 July 2013, Case No. 73469/10, *Nagla v. Latvia*.

²⁵ See ECtHR 12 April 2011, Case No. 4049/08, *Conceição Leiria v. Portugal*; ECtHR 19 April 2011, Case No. 22385/03, *Kasabova v. Bulgaria*; ECtHR 19 April 2011, Case No. 3316/04, *Bozhkov v. Bulgaria*; ECtHR 31 May 2011, Case No. 5995/06, *Šabanović v. Montenegro and Serbia*; ECtHR 28 June 2011, Case No. 28439/08, *Pinto Coelho v. Portugal*; ECtHR 19 July 2011, Case No. 23954/10, *Uj v. Hungary*; ECtHR 26 July 2011, Case No. 41262/05, *Ringier Axel Springer Slovakia, a.s. v. Slovakia*; ECtHR 22 November 2011, Case No. 1723/10, *Mizzi v. Malta*; ECtHR 10 January 2012, Case No. 34702/07, *Standard Verlags GmbH (n° 3) v. Austria*; ECtHR 17 January 2012, Case No. 29576/09, *Lahtonen v. Finland*; ECtHR 21 February 2012, Case Nos. 32131/08 and 41617/08, *Tuşalp v. Turkey*; ECtHR 19 June 2012, Case No. 3490/03, *Tănăsioaica v. Romania*; ECtHR 10 July 2012, Case No. 46443/09, *Eiðsdóttir v. Iceland*; ECtHR 10 July 2012, Case No. 43380/10, *Hlynisdóttir v. Iceland*; ECtHR 18 September 2012, Case No. 39660/07, *Lewandowska-Malec v. Poland*; ECtHR 2 October 2012, Case No. 5126/05, *Yordanova and Toshev v. Bulgaria*; ECtHR 16 October 2012, Case No. 17446/07, *Smolorz v. Poland*; ECtHR 23 October 2012, Case No. 19127/06, *Jucha and Zak v. Poland*; ECtHR 20 November 2012, Case Nos. 36827/06, 36828/06, and 36829/06, *Belek v. Turkey*; ECtHR 27 November 2012, Case Nos. 13471/05 and 38787/07, *Mengi v. Turkey*; ECtHR 22 January 2013, Case Nos. 33501/04, 38608/04, 35258/05, and 35618/05, *OOO Ivpress a.o. v. Russia*; ECtHR 12 February 2013, Case No. 13824/06, *Bugan v. Romania*; ECtHR 23 July 2013, Case No. 33287/10, *Sampaio e Paiva de Melo v. Portugal*; ECtHR 3 September 2013, Case No. 22398/05, *Ümit Bilgiç v. Turkey*; ECtHR 17 September 2013, Case No. 16812/11, *Welsh and Silva Canha v. Portugal*; ECtHR 22 October 2013, Case No. 11867/09, *Soltész v. Slovakia*; ECtHR 29 October 2013, Case No. 66456/09, *Ris-tamäki and Korvola v. Finland*; ECtHR 3 December 2013, Case No. 64520/10, *Ungváry and Irodalom Kft. v. Hungary*; ECtHR 7 January 2014, Cases Nos. 21666/09 and 37986/09, *Ringier Axel Springer Slovakia, a.s. (n° 2-3) v. Slovakia* and ECtHR 17 April 2014, Case No. 20981/10, *Mladina d.d. Ljubljana v. Slovenia*.

²⁶ E.g., when criminal law is applied to prosecute and sanction journalists while reporting on matters of public interest, or in cases of prior restraint or when severe sanctions are imposed on media of journalists, or when journalists are prohibited no longer to exercise their profession.

and the application of Article 10 of the Convention. In *Kaperzyński v. Poland* (3 April 2012) the ECtHR emphasized that it

must exercise caution when the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in a discussion of matters of legitimate public concern. . . . The chilling effect that the fear of criminal sanctions has on the exercise of journalistic freedom of expression is evident. . . . This effect, which works to the detriment of society as a whole, is likewise a factor which goes to the proportionality, and thus the justification, of the sanctions imposed on media professionals.²⁷

In *Cumpănă and Mazăre v. Romania* (Grand Chamber 17 December 2004) the Court made clear that, although sentencing is in principle a matter for the national courts, the imposition of a prison sentence for a press offence is incompatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention. Only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence, a conviction to imprisonment can eventually be justified. The Court observed that "investigative journalists are liable to be inhibited from reporting on matters of general public interest – such as suspected irregularities in the award of public contracts to commercial entities – if they run the risk, as one of the standard sanctions imposable for unjustified attacks on the reputation of private individuals, of being sentenced to imprisonment or to a prohibition on the exercise of their profession. The chilling effect that the fear of such sanctions has on the exercise of journalistic freedom of expression is evident".²⁸ Since *Cumpănă and Mazăre v. Romania* the European Court, at several occasions, held that prison sentences for defamation cannot be justified under Article 10, where the defamatory statements concern a matter of public interest. This rule against prison sentences includes pardoned, suspended, or conditional sentences, effectively removing from European legislatures and courts the ability to impose such sentences in defamation cases to be situated in public debate or political expression.²⁹

²⁷ ECtHR 3 April 2012, Case No. 43206/07, *Kaperzyński v. Poland*.

²⁸ ECtHR Grand Chamber 17 December 2004, Case No. 33348/96, *Cumpănă and Mazăre v. Romania*.

²⁹ ECtHR 18 December 2008, Case No. 35877/04, *Mahmudov and Agazade v. Azerbaijan*; ECtHR 22 April 2010, Case No. 40984/07, *Fattulayev v. Azerbaijan*; ECtHR 6 July 2010, Case No. 37751/07, *Mariapori v. Finland*; ECtHR 31 May 2011, Case No. 9559/06, *Šabanović v. Montenegro and Serbia* and ECtHR 24 September 2013, Case No. 43612/02, *Belpietro v. Italy*. See also ECtHR 8 October 2013, Case No. 30210/06, *Ricci v. Italy* and Parliamentary Assembly of the Council of Europe, *Resolution 1577 (2007): Towards decriminalization of defamation*, <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/eres1577.htm>.

III. The European Court of Human Rights: Guaranteeing and Delimiting the Right to Freedom of Expression and Information

Although the Court's case law gave recognition to the preeminent role of the media in a state governed by the rule of law and has frequently reiterated that the media play a vital role of "public watchdog" in a democracy, as "purveyor of information," still "abusing" freedom of expression in all European States can be sanctioned in one or another way.³⁰ Various laws and regulations indeed restrict freedom of expression and media content, determining the responsibility of every person under the law. The aim of such restrictions is to protect the national states' interests (protection of state security and public order), the protection of morals, the protection of reputation or privacy or more generally "the rights of others," the protection of confidentiality of information, or the authority and impartiality of the judiciary. Other legal provisions are protecting personal data, or prohibiting and punishing "hate speech" that incites to violence, racism, xenophobia, hatred or discrimination. Also broadcasting law, audiovisual media services regulations and legal provisions on advertising or other forms of "commercial speech" contain restrictions on freedom of expression or on media content.³¹

Until a few decades ago, the limits and restrictions of freedom of expression were determined by national states, ultimately scrutinized by their own domestic judicial authorities, without any further external control. This situation, this "paradigm" has significantly changed in Europe, due to the achievement of the European Convention of Human Rights and the enforcement machinery in which the European Court of Human Rights plays a crucial role.³²

³⁰ For an interesting analysis of the notion of "abuse" of human rights, see A. Sajó, ed., *Abuse: The Dark Side of Fundamental Rights* (Utrecht: Eleven International, 2006). See also H. Cannie and D. Voorhoof, "The Abuse Clause and Freedom of Expression under the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?," *Netherlands Quarterly of Human Rights* 1 (2011): 54–83. See also ECtHR 17 December 2013, Case No. 27510/08, *Perinçek v. Switzerland* (referred to Grand Chamber).

³¹ For an overview and analysis, see Commissioner for Human Rights, *Human Rights in a Changing Media Landscape* (Strasbourg: Council of Europe Publishing, 2011); J. Casadevall, E. Myjer, M. O'Boyle and A. Austin, eds., *Freedom of Expression: Essays in Honour of Nicolos Bratza* (Oisterwijk: Wolf Legal Publishers, 2012) and M. Price, S. Verhulst and L. Morgan, eds., *Routledge Handbook of Media Law*.

³² See also D. J. Harris, M. O'Boyle, E. P. Bates and C. M. Buckley, *Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 2009).

With the judgment in the case of *Sunday Times (n° 1) v. The United Kingdom*³³ it has become clear that Article 10 of the European Convention is effectively reducing the national sovereignty and the scope of national limitations restricting the right to freedom of expression and information. The judgment clarified that freedom of expression and information is not only to be respected by government and parliament, but also by the judicial authorities in the member states.³⁴ Most importantly, the Court emphasized that freedom of expression “constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.” It also stated that this freedom “is subject to the exceptions set out in Article 10 § 2, which must, however, be interpreted narrowly.” The Court held that there had been a violation of Article 10 by reason of an injunction restraining the publication in the *Sunday Times* of an article concerning a drug (thalidomide) and the litigation and damage claims linked to its use. The injunction, based on the common law concept of contempt of court, was not found to be “necessary in a democratic society” in the eyes of the Court. With the judgment in the *Sunday Times* case the European Court established, albeit hesitantly at the time,³⁵ a higher level of protection for journalistic reporting on matters of public interest, also recognizing “the right of the public to be properly informed” about matters of interest for society.

Since the *Sunday Times* judgment, an abundant case law of the European Court of Human Rights has made clear that national law prohibiting, restricting or sanctioning expressions or information as forms of public

³³ ECtHR 26 April 1979, Case No. 6538/74, *Sunday Times (n° 1) v. UK*. A few years before, in its first judgment on freedom of expression (ECtHR 7 December 1976, Case No. 5493/72, *Handyside v. UK*), the Court firmly emphasized the importance of freedom of expression in a democratic society, but *in casu* found no breach of Article 10 of the Convention, as the protection of minors was considered to justify the interference by public authorities against the “Little Red Schoolbook” and its publisher, Mr. Handyside.

³⁴ This is regardless of how precisely the European Convention is internally applied or guaranteed in the member states (monistic or dualistic approach). In some countries the European Convention is given precedence over national law and the provisions of the Convention have direct effect; in other countries the Convention has been “indirectly” incorporated into domestic law (e.g., in the UK by the Human Rights Act of 1998 or in Germany by an approval in the Constitution, the *Zustimmungsgesetz*, under Art. 59 of the German Constitution [*Grundgesetz*]). See also Harris et al., *Law of the European Convention on Human Rights*.

³⁵ Indeed, with only a small majority (11/9), the European Court came to the conclusion that there was a violation of Article 10 ECHR, overruling the House of Lords regarding its interpretation of a specific common law application.

communication may only be applied if the interference by the authorities is prescribed by law in a sufficiently precise way, is non-arbitrarily applied, is justified by a legitimate aim and most importantly is to be considered “necessary in a democratic society.” It is the European Court itself that has determined and elaborated the characteristics of the vague and open notion of what can be considered necessary in a democratic society in terms of limiting freedom of expression and information. The Court has reiterated on many occasions that freedom of expression is applicable not only to information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that “offend, shock or disturb.” According to the Court’s case law, an open, pluralistic and democratic society by itself is the most effective, if not the only, guarantor of respect for civil, political, cultural and social rights and freedoms. This means that Article 10 has to be interpreted from a perspective of a high level of protection of freedom of expression and information, even if expressed opinions or information are harmful to the State or some groups, enterprises, organizations or public figures. As set forth in Article 10, freedom of expression is subject to exceptions, which must, however, be construed strictly. The need for any restrictions must be established convincingly, precisely because freedom of expression is considered essential for the functioning of a democratic society.³⁶

If there are no sufficient and pertinent reasons for an interference in one’s freedom of expression or media content or if an interference by the authorities is disproportionate to the legitimate aim pursued, the sanctioning of individuals, journalists, editors, publishers, or broadcasters on the basis of even legitimate, sufficiently precise, transparent and non-discriminatory national law restricting freedom of expression, is considered by the Strasbourg

³⁶ See, e.g., ECtHR Grand Chamber 17 December 2004, Case No. 49017/99, *Pedersen and Baadsgaard v. Denmark*; ECtHR 20 April 2006, Case No. 47579/99, *Raichinov v. Bulgaria*; ECtHR Grand Chamber 7 February 2012, Case No. 39954/08, *Axel Springer AG v. Germany* ECtHR 19 June 2012, Case No. 3490/03, *Tănăsioaica v. Romania* and ECtHR 17 April 2014, Case No. 5709/09, *Brosa v. Germany*. See also E. Dommering, “Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR): Freedom of Expression,” in O. Castendyk, E. Dommering, and A. Scheuer, eds., *European Media Law* (Austin, TX: Wolters Kluwer, 2008), 35–80; E. Barendt, *Freedom of Speech* (Oxford: Oxford University Press, 2007) and D. Voorhoof and T. Mc Gonagle, ed., *Freedom of Expression, the Media and Journalists. Case law of the European Court of Human Rights* (Strasbourg: European Audiovisual Observatory, 2013) [http://www.obs.coe.int/documents/205595/2667238/IRIS+Themes+III+\(final+9+December+2013\).pdf/2e748bd5-7108-4ea7-baa6-59332f885418](http://www.obs.coe.int/documents/205595/2667238/IRIS+Themes+III+(final+9+December+2013).pdf/2e748bd5-7108-4ea7-baa6-59332f885418).

Court as violating Article 10 of the Convention.³⁷ The dynamic interpretation by the Court of what is to be considered “necessary in a democratic society” together with the limitation of the “margin of appreciation” by the member states has been crucial for the impact of Article 10 of the Convention on the protection of freedom of expression in Europe. From this perspective, the Court, as a kind of a European Constitutional Court of Human Rights, albeit a “quasi-Constitutional Court sui generis,”³⁸ played an important role in interpreting and applying the open texture of Article 10 and in determining and

³⁷ See, e.g., ECtHR Grand Chamber 21 January 1999, Case No. 29183/95, *Fressoz and Roire v. France*; ECtHR 3 October 2000, Case No. 34000/96, *Du Roy and Malaurie v. France*; ECtHR 29 March 2001, Case No. 38432/97, *Thoma v. Luxembourg*; ECtHR 28 June 2001, Case No. 24699/94, *VGT Verein gegen Tierfabriken v. Switzerland*; ECtHR 25 June 2002, Case No. 51279/99, *Colombani and Others v. France*; ECtHR 29 March 2005, Case No. 72713/01, *Ukrainian Media Group v. Ukraine*; ECtHR 21 June 2012, Case No. 34124/06, *Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland*; ECtHR 15 November 2012, Case Nos. 53579/09 and 53582/09, *Bargão and Domingos Correia v. Portugal*; ECtHR 27 November 2012, Case Nos. 13471/05 and 38787/07, *Mengi v. Turkey*; ECtHR, 18 december 2012, Case No. 3111/10, *Ahmet Yildirim v. Turkey*; ECtHR 14 March 2013, Case No. 36697/03, *Krylov v. Russia*; ECtHR 3 April 2013, Case No. 4977/05, *Reznik v. Russia*; ECtHR 16 July 2013, Case No. 33846/07, *Węgrzynowski and Smolczewski v. Poland*; ECtHR 23 July 2013, Case No. 33287/10, *Sampaio e Paiva de Melo v. Portugal*; ECtHR 3 September 2013, Case No. 22398/05, *Ümit Bilgiç v. Turkey*; ECtHR 17 September 2013, Case No. 16812/11, *Welsh and Silva Canha v. Portugal*; ECtHR 22 October 2013, Case No. 11867/09, *Soltész v. Slovakia*; ECtHR 29 October 2013, Case No. 66456/09, *Ristamäki and Korvola v. Finland*; ECtHR 3 December 2013, Case No. 64520/10, *Ungváry and Irodalom Kft. v. Hungary* and ECtHR 7 January 2014, Cases Nos. 21666/09 and 37986/09, *Ringier Axel Springer Slovakia, a.s. (n° 2-3) v. Slovakia*; ECtHR 17 April 2014, Case No. 5709/09, *Brosa v. Germany* and ECtHR 15 May 2014, Case No. 19554/05, *Taranenko v. Russia*.

³⁸ L. Wildhaber, “A Constitutional Future for the European Court of Human Rights?,” *Human Rights Law Review* 23 (2002): 161. On the “subsidiary” role of the ECHR and the ECtHR, see also: High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 19 and 20 April 2012, www.coe.int/en/20120419-brighton-declaration/. As N. Bratza, former president of the ECtHR, concisely formulated in a speech to the Parliamentary Assembly in September 2012: “The Strasbourg role is subsidiary to the national role. The primary responsibility for respecting human rights rests with States. It is for them to act in the first place. Failing that, it is then the responsibility of the Court and the Committee of Ministers to ensure that the rights which States have enshrined in the Convention are given effect to in practice” (<http://echrblog.blogspot.dk/2012/09/speech-of-bratza-and-candidates-for-new.html>). See also Council of Europe, *The European Convention on Human Rights: Interlaken, İzmir, Brighton and beyond. A compilation of instruments and texts relating to the ongoing reform of the ECHR* (2014), http://www.coe.int/t/DGHL/STANDARDSETTING/CDDH/REFORMECHR/Publications/Compilation%20ReformECHR2014_en.pdf.

developing the actual scope and level of freedom of expression and information in Europe. The Court also stated at several occasions that the Convention, as a “living instrument”, is intended “to guarantee not rights that are theoretical and illusory, but rights that are practical and effective.”³⁹

IV. From *Sunday Times* (n° 1) in 1979 to *Taranenko* in 2014

With the *Sunday Times* (n° 1) case as a starting point, followed years later by the judgments in *Barthold v. Germany*⁴⁰ and *Lingens v. Austria*,⁴¹ many European countries have been found in violation with Article 10 after journalists, publishers, broadcasting organizations, individual citizens, civil servants, academics, politicians, artists, activists or non-governmental organizations applied to the European Court as a victim of an illegitimate, unjustifiable or disproportionate interference in their freedom of expression.⁴² As a consequence of this case law by the Strasbourg Court and due to the binding character of the Convention, the member states are under a duty to modify and improve their standards of protection of freedom of expression in order to comply with their obligations under the European Convention (Article 1). This approach affects particularly the level of protection of journalistic reporting, political debate and discussion on matters of public interest, pushing back some traditional limitations of freedom of expression in many countries, limitations which can no longer be considered as justified in a democratic society. In some cases the European Court itself imposed the government of the defendant state to take concrete measures in order to have the applicant's freedom of expression and information immediately respected or restored, like in *Fattulayev v. Azerbaijan* (order of immediate release from prison of journalist convicted for defamation of public authorities) or in *Youth Initiative for Human Rights v. Serbia* (ordering that the Intelligence Agency of Serbia should provide the applicant NGO with the information requested).⁴³

³⁹ See, e.g., ECtHR Grand Chamber 7 June 2012, Case No. 38433/09, *Centro Europa 7 S.R.L. and Di Stefano v. Italy*.

⁴⁰ ECtHR 25 March 1985, Case No. 8734/79, *Barthold v. Germany* (unjustified interference by way of injunctions, issued against a veterinary surgeon restraining him from repeating in press interviews specified statements regarding the need for a night veterinary service and the running of his clinic offering such a service).

⁴¹ ECtHR 8 July 1986, Case No. 9815/82, *Lingens v. Austria* (unjustified conviction of a journalist for defamation of and insulting value judgments about a politician).

⁴² For an interesting set of analyses of the Court's case law, see J. Casadevall, E. Myjer, M. O'Boyle, and A. Austin, eds., *Freedom of Expression: Essays in Honour of Nicolos Bratza*.

⁴³ ECtHR 22 April 2000, Case No. 40984/07, *Fattulayev v. Azerbaijan* and ECtHR 25 June 2013, Appl. No. 48135/06, *Youth Initiative for Human Rights v. Serbia*.

At the same time the European Court is also an important actor in preserving press freedom against new initiatives restraining that freedom. The Court's case law reveals opposition against introducing new limitations or imposing additional obligations that risk to neglect the important role of critical and independent media in a democratic society. A good illustration is the judgment of the European Court in the case *Mosley v. The United Kingdom* in 2011. The European Court of Human Rights decided that the right of privacy guaranteed by Article 8 of the European Convention on Human Rights does not require media to give prior notice of intended publications to those who feature in them. The case goes back to 2008 when the *News of the World* published on its front page an article about Mr. Mosley, entitled "F1 Boss Has Sick Nazi Orgy with 5 Hookers." Several pages inside the newspaper were devoted to the story which included still photographs taken from video footage secretly recorded by one of the participants in the sexual activities. While damages were awarded to Mr. Mosley for the breach of his privacy, he complained that, despite the monetary compensation awarded to him, he remained a victim of a breach of his privacy as a result of the absence of a legal duty for media and journalists to notify in advance of their intention to publish material concerning a person, thus giving that person the opportunity to ask a court for an interim injunction and prevent the material's publication. The European Court found that the publications in question had resulted in a flagrant and unjustified invasion of Mr. Mosley's private life, justifying an award of damages. The question which remained to be answered was whether a legally binding pre-notification rule was required: should such an obligation exist or be introduced for the effective protection of the right of privacy, based on Article 8 of the Convention? The European Court recalled that in the United Kingdom, the right to private life had been protected with a number of measures: there was a system of self-regulation of the press; people could claim damages in civil court proceedings; and, if individuals were aware of an intended publication touching upon their private life, they could seek an interim injunction preventing publication of the material. As a pre-notification requirement would inevitably also affect political reporting and serious journalism, the European Court stressed that such a measure required careful scrutiny. The European Court further noted that Mr. Mosley had not referred to a single jurisdiction in which a pre-notification requirement as such existed, nor had he indicated any international legal texts requiring States to adopt such a requirement. Furthermore, as any pre-notification obligation would have to allow for an exception if public interest was at stake, a newspaper should be able to opt not to notify an individual if it believed that it could subsequently defend its decision on the basis of the public interest in the information published. The European Court observed in that regard that a narrowly defined public interest exception would increase the chilling effect of any pre-notification duty. Anyway, a newspaper could

choose under a system in which a pre-notification requirement was applied, to run the risk to decline to notify, preferring instead to pay a subsequent fine. Any pre-notification requirement would only be as strong as the sanctions imposed for failing to observe it. The Court emphasized that particular care had to be taken when examining constraints which might operate as a form of censorship prior to publication. Although punitive fines and criminal sanctions could be effective in encouraging pre-notification, that would have a chilling effect on journalism, even political and investigative reporting, both of which attract a high level of protection under the Convention. That ran the risk of being incompatible with the Convention requirements of freedom of expression guaranteed by Article 10 of the Convention. Having regard to the chilling effect to which a pre-notification requirement risked giving rise, to the doubts about its effectiveness and to the margin of appreciation afforded to the defendant state in this matter, the European Court finally concluded that Article 8 did not require a legally binding pre-notification requirement.⁴⁴

In another recent case, *Węgrzynowski and Smolczewski v. Poland*, the Court delivered an important judgment regarding a request for removal of an online newspaper article. The case concerned the complaint by two lawyers that a newspaper article damaging to their reputation—which the Polish courts, in previous libel proceedings, had found to be based on insufficient information and in breach of their rights—remained accessible to the public on the newspaper's website. The Court is of the opinion that the newspaper was not obliged to completely remove from its Internet archive the article at issue. It accepts that the State complied with its obligation to strike a balance between the rights guaranteed by Article 10 and, on the other hand, Article 8 of the Convention. The Court is of the opinion that the removal of the online article for the sake of the applicant's reputation in the circumstances of the present case would have been disproportionate under Article 10 of the Convention, as a rectification or an additional comment on the website would have been a sufficient and adequate remedy. The Court considered

that it is not the role of judicial authorities to engage in rewriting history by ordering the removal from the public domain of all traces of publications which have in the past been found, by final judicial decisions, to amount to unjustified attacks on individual reputations. Furthermore, it is relevant for the assessment of the case that the legitimate interest of the public in access to the public Internet archives of the press is protected under Article 10 of the Convention.

⁴⁴ ECtHR 10 May 2011, Case No. 48009/08, *Mosley v. UK*.

The Court is of the view that the alleged violations of rights protected under Article 8 of the Convention should be redressed by adequate remedies available under domestic law and it notices “that in the present case the Warsaw Court of Appeal observed that it would be desirable to add a comment to the article on the website informing the public of the outcome of the civil proceedings in which the courts had allowed the applicants’ claim for the protection of their personal rights claim.”⁴⁵

The European Court of Human Rights has also reinforced the right of individuals to access the Internet, in a judgment against wholesale blocking of online content. In its judgment, the Court asserted that the Internet has now become one of the principal means of exercising the right to freedom of expression and information. A Turkish PhD student named Ahmet Yildirim claimed before the European Court that he had faced “collateral censorship” when his Google-hosted website was shut down by the Turkish authorities as a result of a judgment by a criminal court ordering to block access to Google Sites in Turkey. The court injunction was promulgated in order to prevent further access to one particular website hosted by Google, which included content deemed offensive to the memory of Mustafa Kemal Atatürk, the founder of the Turkish Republic. Due to this order, Yildirim’s academically focused website, which was unrelated to the website with the allegedly insulting content regarding the memory of Atatürk, was effectively blocked by the Turkish Telecommunications Directorate (TIB). According to TIB, blocking access to Google Sites was the only technical means of blocking the offending site, as its owner was living outside Turkey. Yildirim’s subsequent attempts to remedy the situation and to regain access to his website hosted by the Google Sites service were unsuccessful. The European Court is of the opinion that the decision taken and upheld by the Turkish authorities to block access to Google Sites amounted to a violation of Article 10 of the Convention, as the order, in the absence of a strict legal framework, was not prescribed by law. Although the order might have had a legitimate aim, as it was aimed at blocking a website allegedly insulting the memory of Atatürk, the order was not sufficiently based on a strict legal framework regulating the scope of a ban and affording the guarantee of judicial review to prevent possible abuses. The Court clarified that a restriction on access to a source of information is only compatible with the Convention if a strict legal framework, containing such guarantees, is in place. The judgment further makes clear that the Turkish courts should have had regard to the fact that such a measure would render large amounts of information inaccessible, thus directly affecting the rights of Internet users and having a significant collateral effect. It is also observed that the Turkish

⁴⁵ ECtHR 16 July 2013, Case No. 33846/07, *Węgrzynowski and Smolczewski v. Poland*. Compare, on the ‘right to be forgotten’ with CJEU (Grand Chamber) 13 May 2013, C 131/12, *Google Spain*.

law had conferred extensive powers to an administrative body, the TIB, in the implementation of a blocking order originally issued in relation to a specified website. Moreover, there was no evidence that Google Sites had been informed that it was hosting content held to be illegal, or that it had refused to comply with an interim measure concerning a site that was the subject of pending criminal proceedings. Furthermore, the criminal court had not made any attempt to weigh up the various interests at stake, in particular by assessing whether it was necessary and proportionate to block all access to Google Sites. The European Court observes that the Turkish law obviously did not require the court to examine whether the wholesale blocking of Google was justified. Such a measure that renders large amounts of information on the Internet inaccessible must be considered, however, to effect directly the rights of Internet users, having a significant collateral damage on their right of access to the Internet. As the effects of the measure have been arbitrary and the judicial review of the blocking of access to Internet websites has been insufficient to prevent abuses, the interference with Mr. Yildirim's rights amounts to a violation of Article 10 of the Convention by the Turkish authorities.⁴⁶

The most recent judgment integrated in this analysis concerns the case *Taranenko v. Russia*. The Court's judgment illustrates how Article 10, in relation with Article 11 (freedom of assembly and association), also protects collective action, expressive conduct and distribution of leaflets as a form of protected speech. The Court reiterated that "the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Thus, it should not be interpreted restrictively". The case concerned the detention and conviction of Ms Taranenko, a participant in a protest against the politics of President Putin in 2004. The protesters had occupied the reception area of the President's Administration building in Moscow and locked themselves in an office. They waved placards with "Putin, resign!" («Путин, уйди!») and distributed leaflets with a printed address to the President that listed ten ways in which he had failed to uphold the Russian Constitution, and a call for his resignation. The European Court underlined that the protest, although involving some disturbance of public order, had been largely non-violent and had not caused any bodily injuries. The Court found in particular that while a sanction for Ms. Taranenko's actions might have been warranted by the demands of pub-

⁴⁶ ECtHR 18 December 2012, Case No. 3111/10, *Ahmet Yildirim v. Turkey*. Also in *Delfi AS v. Estonia* (ECtHR 10 October 2013, Case No. 64569/09) the Court dealt with an important issue of freedom of expression on the Internet, more precisely on the (limited) liability of the provider of an online news portal regarding defamatory and insulting comments posted by users. The case is referred to the Grand Chamber (see also IRIS (online) 4 (2014): 1, http://merlin.obs.coe.int/newsletter.php?year=2014&issue=4&iris_ref=2014+4+1).

lic order, her detention pending trial of almost one year and the suspended prison sentence of three years imposed on her had not been proportionate and had to have had a deterring effect on protesters. The Court concluded that the interference had not been “necessary in a democratic society” for the purposes of Article 10. There had accordingly been a violation of Article 10 interpreted in the light of Article 11.⁴⁷

In between *Sunday Times (n° 1) v. The United Kingdom* in April 1979 and *Taranenko v. Russia* in May 2014, the European Court has determined and clarified the scope and the limits of the right to freedom of expression in Europe in about a thousand judgments. Especially in the last 15 years, since its reform in 1999, the European Court has frequently come to the conclusion that the right to freedom of expression has been violated by a member state.⁴⁸

⁴⁷ ECtHR 15 May 2014, Case No. 19554/05, *Taranenko v. Russia*. See also ECtHR 23 September 1998, Case No. 24838/94, *Steel and Others v. UK*; ECtHR Grand Chamber 25 November 1999, Case No. 25594/94, *Hashman and Harrup v. UK*; ECtHR (Decision) 18 March 2003, Case No. 39013/02, *Lucas v. UK*; ECtHR 2 February 2006, Case No. 68416/01, *Steel and Morris v. UK*; ECtHR 3 May 2007, Case No. 1543/06, *Bączkowski and Others v. Poland*; ECtHR 6 November 2008, Case No. 68294/01, *Kandzhov v. Bulgaria*; ECtHR 23 October 2008, Case No. 10877/04, *Kuznetsov v. Russia*; ECtHR 13 January 2009, Case No. 31451/03, *Açık v. Turkey*; ECtHR 3 February 2009, Case No. 31276/05, *Women on Waves v. Portugal*; ECtHR 2 February 2010, Case No. 25196/04, *Christian Democratic People's Party (n° 2) v. Moldova*; ECtHR 14 September 2010, Case Nos. 6991/08 and 15084/08, *Hyde Park and Others (n° 5-6) v. Moldova*; ECtHR 1 December 2011, Case Nos. 8080/08 and 8577/08, *Schwabe and M.G. v. Germany*; ECtHR 12 June 2012, Case Nos. 26005/08 and 26160/08, *Tatár and Fáber v. Hungary* and ECtHR 26 November 2013, Case No. 3753/05, *Kudrevičius and others v. Lithuania* (referred to Grand Chamber). Compare with ECtHR 25 August 1993, Case No. 13308/87, *Chorherr v. Austria*; ECtHR 7 October 2008, Case No. 10346/05, *Molnár v. Hungary*; ECtHR (Decision) 30 March 2010, Case Nos. 2373/07 and 2396/07, *Annen v. Germany*; ECtHR 13 January 2011, Case Nos. 397/07 en 2322/07, *Hoffer and Annen v. Germany*; ECtHR Grand Chamber 13 July 2012 Case No. 16354/06, *Mouvement Raëlien Suisse v. Switzerland*; ECtHR (Decision) 12 February 2013, Case No. 55558/10, *Annen v. Germany*.

⁴⁸ In hundreds of cases the Court found a violation of Article 10. However, it is to be underlined that only a minority of the applications introduced in Strasbourg lead to a final judgment by the European Court, as most applications are considered, by a Committee of three judges or by the Court, or recently by a single Judge, inadmissible for diverse reasons, e.g., for not fulfilling the condition of exhaustion of all (relevant) domestic remedies, for the lack of status as a “victim,” for not applying within a period of six months or because the application is considered manifestly ill-founded (Art. 35 ECHR). For some interesting examples, see ECtHR (Decision) 23 June 2003, Case No. 65831/01, *Garaudy v. France* (denial of holocaust excluded from protection of Article 10, in application of Article 17 of the Convention—prohibition of abuse of rights); ECtHR (Decision) 8 December 2005, Case No. 40485/02, *Nordisk Film & TV A/S v. Denmark* (compelling order to hand over unedited footage, interference is proportionate to the legitimate aim pursued and the reasons given by the Danish

In many other cases the Court agreed, however, with the defending State and declared the application inadmissible or, in a later stage, came to the conclusion that an interference was in accordance with the “triple test” of Article 10 of the Convention, finding no violation of freedom of expression.

The practical and effective impact of Article 10 still differs from one member state to another, which by itself is an indication of the somewhat weak enforcement instruments of the Convention and of the very different levels of development of democracy and respect for human rights in the Convention’s member states. During the last ten years, Turkey, one of the 13 founding States of the Convention in 1950,⁴⁹ has been found over and over again to have acted in breach of the right to freedom of (political) expression.⁵⁰ The situation in terms of freedom of expression and informa-

Supreme Court in justification of those measures were relevant and sufficient, application manifestly ill-founded within the meaning of Article 35(3) ECHR). See also ECtHR (Decision) 10 May 2011, Case No. 1685/10, *Karttunen v. Finland* (conviction of artist—without punishment—and confiscation because of pornographic pictures integrated in a work of art. The pictures, downloaded from the Internet, included teenage girls participating in violent sexual behavior. The artist claimed that she had included the pictures in her work in an attempt to encourage discussion and raise awareness of how widespread and easily accessible child pornography was. The European Court agreed with the domestic courts that possessing and distributing sexually obscene pictures depicting children was still an act subject to criminal liability); ECtHR (Decision) 24 May 2011, Case No. 22918/08, *Mikkelsen and Christensen v. Denmark* (conviction of two journalists for having purchased and transported illegal fireworks without permission, contrary to Section 7 of the Danish Fireworks Act. The purchase was filmed and used in the applicants’ journalistic documentary on Danish television, demonstrating that there are illegal circuits of fireworks. Due to compelling safety considerations, and as there were alternatives to demonstrate the illegal trade in firework, the conviction by way of modest fine was considered not being inconsistent with Article 10 of the Convention); and ECtHR (Decision) 24 January 2012, Case Nos. 32844/10 and 33510/10, *Seckerson v. UK and Times Newspapers v. UK* (publication of an interview with a jury member, being held to constitute contempt of court. The convictions were considered to be necessary under Article 10 and therefore the complaint of breach of Article 10 was manifestly inadmissible).

⁴⁹ The 13 European states that signed the European Convention of Human Rights and Fundamental Freedoms in 1950 were Belgium, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Turkey, and the United Kingdom.

⁵⁰ In 223 cases the Court has found a violation of freedom of expression by the Turkish authorities. In a few cases the Turkish government negotiated a friendly settlement, recognizing that Turkish law and practice urgently needed to be brought into line with the Convention’s requirements under Article 10 ECHR. The procedure leading eventually to Turkey’s membership in the EU has proved to have only minor positive influences with regard the respect for human rights in general and, specifically, freedom of political expression in Turkey. Freedom of the press, freedom of artistic expression and political speech and demonstrations are still system-

tion is also very problematic in some of the “new” member states, especially in Russia, Georgia, Armenia, Moldova, Azerbaijan and Ukraine, but also in Romania, Bulgaria, Serbia, Bosnia and Herzegovina, Albania, Croatia and Hungary. Disrespect for freedom of expression and information and press freedom in these countries goes hand in hand with violations of other fundamental human rights and freedoms. On the other hand, the countries with a high level of press freedom, as also reported in the international ratings of Reporters without Borders (Reporters Sans Frontières [RSF]) or Freedom House,⁵¹ are countries in which democracy, transparency, respect for human rights and the rule of law is strongly rooted, institutionalized and integrated into society.

V. Some Characteristics of the European Court’s Case Law

A. The Court’s Supervisory Role

Over the years, the European Court of Human Rights has developed a substantial body of case law in which it has expressed and clarified some basic principles which inherently influence the impact of Article 10 of the Convention. The Court has also elaborated a framework of guiding principles in order to apply its *supervisory role* essentially regarding the necessity of an interference in the right to freedom of expression.⁵²

The Court’s task in exercising its supervisory function is to review under Article 10, “in the light of the case as a whole,” the decisions the domestic authorities have taken pursuant to their power of appreciation. In essence,

atically interfered with by the Turkish authorities, violating structurally Articles 10 and 11 of the Convention. See, e.g., ECtHR 14 September 2010, Case Nos. 2668/07, 6102/08, 30079/08, 7072/09, and 7124/09, *Dink v. Turkey*; ECtHR 21 February 2012, Case No. 32131/08 and 41617/08, *Tuşalp v. Turkey* and ECtHR 25 March 2014, Case Nos. 39690/06, 40559/06, 48815/06, 2512/07, 55197/07, 55199/07, 55201/07 and 55202/07, *Bayar (n° 1-8) v. Turkey*.

⁵¹ See www.rsf.org and www.freedomhouse.org. See also L. Becker, R. Vlad and N. Nusser, “An Evaluation of Press Freedom Indicators,” *International Communication Gazette* 1 (2007): 5–28.

⁵² These general principles are reiterated or reformulated in many judgments of the European Court. For some examples, see, e.g., ECtHR Grand Chamber 22 October 2007, Case Nos. 21279/02 and 36448/02, *Lindon, Otchakovsky-Laurens and July v. France*; ECtHR Grand Chamber 10 December 2007, Case No. 69698/01, *Stoll v. Switzerland*; ECtHR 16 July 2009, Case No. 15615/07, *Féret v. Belgium*; ECtHR Grand Chamber 7 February 2012, Case No. 39954/08, *Axel Springer AG v. Germany*; ECtHR 7 February 2012, Case Nos. 40660/08 and 60641/08, *Von Hannover (n° 2) v. Germany*; and ECtHR Grand Chamber 13 July 2012, Case No. 16354/06, *Mouvement raëlien Suisse v. Switzerland*.

the Court has to satisfy itself that the national authorities applied standards which are in conformity with the principles embodied in Article 10 of the Convention, and moreover, that they have based their decisions on an *acceptable assessment of the relevant facts*. The Court also checks whether it has been demonstrated that effective and adequate safeguards and procedural guarantees, such as a judicial review, were available in order to secure the right to freedom of expression.⁵³

The Court looks at a set of aspects of a case before deciding whether or not an interference with the right to freedom of expression of the applicant(s) is necessary in a democratic society. This “contextualization” of its law-finding implies that the Court focuses on the case in its different aspects, “in the light of the case as a whole.” To this end the Court will take into account *who* is invoking the right to freedom of expression, *what* was published, broadcasted or imparted, *who* was eventually criticized or insulted, *how* the opinions or statements were formulated or what medium was used, *to whom* the message was directed or who could receive the information, *when* something was published, broadcasted or imparted, *where* and under *which circumstances* something was made public, with what *intention* information was made public or allegations or opinions were formulated, and what the possible *effect* or impact of the message was. The Court finally will also take into account the character of the interference or the severity or *proportionality* of the sanctions, before finally deciding whether or not an interference with the right to freedom of expression amounted to a violation of Article 10 of the Convention. Especially in some Grand Chamber judgments the European Court enumerates or refers explicitly to the criteria it considers relevant to elaborate and motivate its finding whether or not the interference at issue is to be considered necessary in a democratic society. The judgment in *Axel*

⁵³ ECtHR 13 February 2003, Case Nos. 40153/98 and 40160/98, *Çetin v. Turkey*; ECtHR 23 September 1998, Case No. 24838/94, *Steel and Others v. UK*; ECtHR 29 March 2005, Case No. 72713/01, *Ukrainian Media Group v. Ukraine*; ECtHR 16 June 2005, Case No. 55120/00, *Independent News and Media and Independent Newspapers Limited v. Ireland*; ECtHR 11 April 2006, Case No. 60608/00, *Mehmet Emin Yildiz and Others v. Turkey*; ECtHR 20 April 2006, Case No. 47579/99, *Raichinov v. Bulgaria*; and ECtHR 27 June 2006, *Saygili and Seyman v. Turkey*. See also ECtHR 13 July 1995, Case No. 18139/91, *Tolstoy Miloslavsky v. UK*; ECtHR 17 July 2001, Case No. 39288/98, *Association Ekin v. France*; ECtHR 14 March 2002, Case No. 26229/95, *Gaweda v. Poland*; ECtHR 26 July 2007, Case No. 64209/01, *Peev v. Bulgaria*; ECtHR 11 October 2007, Case No. 14134/02, *Glas Nadezhda Eood & Elenkov v. Bulgaria*; ECtHR 17 June 2008, Case No. 32283/04, *Meltex Ltd. and Mesrop Movsesyan v. Armenia*; ECtHR 14 April 2009, Case No. 37374/05, *Társaság a Szabadságjogokért v. Hungary*; ECtHR 26 May 2009, Case No. 31475/05, *Kenedi v. Hungary*; ECtHR 7 December 2010, Case No. 10734/05, *Mackay & BBC Scotland v. The UK*; ECtHR 21 July 2011, Case Nos. 32181/04 and 35122/05, *Sigma Radio Television Ltd. v. Cyprus*; and ECtHR Grand Chamber 13 July 2012, Case No. 16354/06, *Mouvement raëlien Suisse v. Switzerland*.

Springer AG v. Germany is a clear illustration of this approach. The case concerned the media coverage by the newspaper *Bild* of the arrest and conviction of a famous TV actor (X), found in possession of drugs. X brought injunction proceedings against the publishing company of *Bild* because of the publication of two articles, one reporting that X was arrested for the possession of cocaine and another, a year later, that he was also convicted. The German courts granted X's request, prohibiting any further publication of the two articles and the photos illustrating these articles. The Grand Chamber, however, found that the interference in *Bild's* reporting by the German authorities amounted to a violation of Article 10 of the European Convention, taking into account the following six criteria: the contribution to a debate of general interest, the fact that the reporting concerned a public figure, the subject of the report related to a serious drug offence, the prior conduct of the person concerned, the method of obtaining the information and its veracity, the content, form and consequences of the media content and finally the severity of the sanction imposed. Considering each of these elements the European Court found that the injunctions against *Bild* were capable of having a chilling effect on the applicant's freedom of expression. In conclusion, the grounds advanced by the German authorities, although relevant, were not considered sufficient to establish that the interference complained of by Springer Verlag AG was necessary in a democratic society.⁵⁴

It is important to notice that, according to the Strasbourg Court's case law, national authorities should not only abstain from interferences in freedom of expression and press freedom that are not necessary in a democratic society. The state has also *positive obligations to protect the right of freedom of expression* against interferences by private persons or corporate organizations. The Court has emphasized that "in addition to the primary negative undertaking of a State to abstain from interferences in Convention guarantees, there may be positive obligations inherent in such guarantees. The responsibility of a State may then be engaged as a result of not observing its obligations."⁵⁵ In the case of *Özgür Gündem v. Turkey* the Court developed this approach by claiming that "genuine, effective exercise of freedom of expression does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals." After a campaign that involved killings, disap-

⁵⁴ ECtHR Grand Chamber 7 February 2012, Case No. 39954/08, *Axel Springer AG v. Germany*.

⁵⁵ ECtHR 29 February 2000, Case No. 39293/98, *Fuentes Bobo v. Spain*; ECtHR 16 March 2000, Case No. 23144/93, *Özgür Gündem v. Turkey*; ECtHR 28 June 2001, Case No. 24699/94, *VGT Verein gegen Tierfabriken v. Switzerland*; ECtHR Grand Chamber 30 June 2009, Case No. 32772/02, *VGT Verein gegen Tierfabriken (n° 2) v. Switzerland*; and ECtHR 16 July 2009, Case No. 20436/02, *Wojtas-Kaleta v. Poland*. See also ECtHR 6 May 2003, Case No. 44306/98, *Appleby and Others v. UK*.

pearances, injuries, prosecutions, seizures and confiscation, the newspaper *Özgür Gündem* had ceased publication. According to the European Court, the Turkish authorities had failed to comply with their positive obligation to protect the newspaper and its journalists in the exercise of their freedom of expression.⁵⁶ In a case against Sweden the Court made clear that although its task is not to settle disputes of a purely private nature, “it cannot remain passive where a national court’s interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary, discriminatory or, more broadly, inconsistent with the principles underlying the Convention.”⁵⁷

However, in some areas the Court accepts a broad margin of appreciation by the member states, such as in matters of positive obligations by member states,⁵⁸ in cases where interferences are based on the protection of morals,⁵⁹ regarding restrictions on commercial speech⁶⁰ and regarding the assessment of damages in libel or defamation cases,⁶¹ although in each of these areas the Court has also found violations of Article 10.⁶² In the area of political speech or debate on matters of public interest, the margin of appreciation for the member states

⁵⁶ ECtHR 16 March, Case No. 23144/93, *Özgür Gündem v. Turkey*.

⁵⁷ ECtHR 16 December 2008, Case No. 23883/06, *Khurshid Mustafa and Tarzibachi v. Sweden*.

⁵⁸ ECtHR 6 May 2003, Case No. 44306/98, *Appleby and Others v. UK*

⁵⁹ ECtHR 7 December 1976, Case No. 5493/72, *Handyside v. UK*; ECtHR 24 May 1988, Case No. 10737/84, *Müller and Others v. Switzerland*; ECtHR 20 September 1994, Case No. 13470/87, *Otto-Preminger-Institut v. Austria*; ECtHR 25 November 1996, Case No. 17419/90, *Wingrove v. UK*; and ECtHR 13 September 2005, Case No. 42571/98, *I.A. v. Turkey*. See also ECtHR 10 July 2003, Case No. 44179/98, *Murphy v. Ireland*.

⁶⁰ ECtHR 20 November 1989, Case No. 10572/83, *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*; ECtHR 24 February 1994, Case No. 15450/89, *Casado Coca v. Spain*; ECtHR 5 November 2002, Case No. 38743/97, *Demuth v. Switzerland*; ECtHR 5 March 2009, Case No. 26935/05, *Société de Conception de Presse et d’Edition and Ponson v. France*; ECtHR 5 March 2009, Case No. 13353/05, *Hachette Filipacchi Presse Automobile and Dupuy v. France*; and ECtHR 10 January 2013, Case No. 36769/08, *Ashby Donald a.o. v. France*. See also ECtHR 10 July 2003, Case No. 44179/98, *Murphy v. Ireland*.

⁶¹ ECtHR 16 June 2005, Case No. 55120/00, *Independent News and Media and Independent Newspapers Limited v. Ireland*.

⁶² ECtHR 4 December 2003, Case No. 35071/97, *Gündüz v. Turkey*; ECtHR 31 January 2006, Case No. 64016/00, *Giniewski v. France*; ECtHR 2 May 2006, Case No. 50692/99, *Aydin Tatlav v. Turkey*; ECtHR 17 October 2002, Case No. 37928/97, *St-ambuk v. Germany*; ECtHR 28 June 2001, Case No. 24699/94, *VGT Verein gegen Tierfabriken v. Switzerland*; ECtHR 29 February 2000, Case No. 39293/98, *Fuentes Bobo v. Spain*; ECtHR 16 March 2000, Case No. 23144/93, *Özgür Gündem v. Turkey*; ECtHR 4 October 2007, Case No. 32772/02, *VGT Verein gegen Tierfabriken (n° 2) v. Switzerland*; ECtHR 21 July 2011, Case No. 28274/08, *Heinisch v. Germany*; ECtHR 6 October 2011, Case No. 32820/09, *Vellutini and Michel v. France*; and ECtHR 10 May 2012, Case No. 25329/03, *Frasila and Ciocirlan v. Romania*. See also ECtHR

is definitely narrower and there is little scope under Article 10 of the Convention for restrictions in this area. In the terms of the Court “the most careful scrutiny on the part of the Court is called for when . . . the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern.”⁶³

A striking example of the impact of the Court’s case law is the case of *TV Vest and Rogaland Pensjonistparti v. Norway* in which the Court was not persuaded that the application of a ban on paid political advertising had the desired effect. In a remarkable judgment the Court explicitly rejected the view expounded by the Norwegian government that there was no viable alternative to a blanket ban.⁶⁴ Due to the judgment in the case against Norway, some countries have already modified or are reviewing their legislation on this topic.⁶⁵

B. Freedom of Expression, Public Debate and Defamation of Politicians or Public Figures

One of the main characteristics of the Court’s case law over the years is the emphasis on the freedom of political debate and critical information regarding politics and politicians. The Court has recognized that there are *wider limits of acceptable criticism as regards a politician or a public figure* as such,

13 July 1995, Case No. 18139/91, *Tolstoy Miloslavsky v. UK*; and ECtHR 18 January 2011, Case No. 39401/04, *MGN Limited v. UK*.

⁶³ See, e.g., ECtHR 23 September 1994, Case No. 15890/89, *Jersild v. Denmark*; ECtHR Grand Chamber 20 May 1999, Case No. 21980/93, *Bladet Tromsø and Stensaas v. Norway*; ECtHR 25 June 2002, Case No. 51279/99, *Colombani and Others v. France*; ECtHR 11 December 2008, Case No. 21132/05, *TV Vest and Rogaland Pensjonistparti v. Norway*; and ECtHR 26 February 2009, Case No. 29492/05, *Kudeshkina v. Russia*. The protection of political speech in parliament is considered to be absolute: ECtHR 17 December 2002, Case No. 35373/97, *A. v. UK*, while the politician’s freedom of expression outside parliament is to be balanced with Article 6 and/or Article 8 of the Convention: ECtHR 30 January 2003, Case Nos. 40877/98 and 45649/99, *Cordova (n° 1 and 2) v. Italy*; and ECtHR 24 February 2009, Case No. 46967/07, *C.G.I.L. and Cofferati v. Italy*. See also ECtHR 27 February 2001, Case No. 26958/95, *Jerusalem v. Austria*, and compare ECtHR 24 May 2011, Case No. 26218/06, *Onorato v. Italy*.

⁶⁴ ECtHR 11 December 2008, Case No. 21132/05, *TV Vest and Rogaland Pensjonistparti v. Norway*.

⁶⁵ See also T. Lewis, “Reasserting the Primacy of Broadcast Political Speech after Animal Defenders International? *Rogaland Pensioners Party v. Norway*,” *Journal of Media Law* 1 (2009): 37–48. In Belgium the Constitutional Court annulled a provision prohibiting political advertising in audio-visual media in the French Community: GwH 22 December 2010, nr. 161/2010, www.const-court.be. See also, in contrast, ECtHR Grand Chamber 22 April 2013, Case No. 48876/08, *Animal Defenders International v. UK*.

than as regards a private individual. In several judgments, the Court has reiterated that a politician “inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.”⁶⁶ The Court went a step further regarding public debate and criticism about *governments and executive bodies*, as

the limits of permissible criticism are wider with regard to a government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to libel proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.⁶⁷

Members of parliament, local politicians, governments, public authorities or public figures in general have to accept even sharp criticism, sometimes expressed in a harsh or hostile tone. The Court takes into account “that political invective often spills over into the personal sphere; such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society”⁶⁸ The Court considers that even offensive or extreme language, which may fall outside the protection of freedom of expression if its sole intent is to insult, may be protected by Article 10 when serving merely stylistic purposes, as part of a criticism to be situated in political debate.⁶⁹ Journalists themselves must also accept criticism in a polemical tone, e.g. by other journalists or by politicians. Police officers, members of the military, public prosecutors and even (sometimes) judges can be sharply criticized under the protection of Article 10 of the Convention. In some recent cases, the Court has also created space for employees taking part in public debate or in discussion on matters of public interest, even directly criticizing their employer or the management of the company they are employed in.⁷⁰

⁶⁶ ECtHR 29 March 2005, Case No. 72713/01, *Ukrainian Media Group v. Ukraine*; ECtHR 17 April 2014, Case No. 20981/10, *Mladina d.d. Ljubljana v. Slovenia* and ECtHR 17 April 2014, Case No. 5709/09, *Broas v. Germany*.

⁶⁷ See, e.g., ECtHR 26 July 2007, Case No. 25968/02, *Dyuldin and Kislov v. Russia*.

⁶⁸ ECtHR 28 September 2000, Case No. 37698/97, *Lopes Gomes Da Silva v. Portugal* and ECtHR 17 April 2014, Case No. 20981/10, *Mladina d.d. Ljubljana v. Slovenia*

⁶⁹ ECtHR 21 February 2012, Case Nos. 32131/08 and 41617/08, *Tuşalp v. Turkey* and ECtHR 17 April 2014, Case No. 20981/10, *Mladina d.d. Ljubljana v. Slovenia*.

⁷⁰ ECtHR 29 February 2000, Case No. 39293/98, *Fuentes Bobo v. Spain*; ECtHR 16 July 2009, Case No. 20436/02, *Wojtas-Kaletka v. Poland*; ECtHR 21 July 2011, Case No.

On several occasions the Court has observed that private individuals and to some extent also public persons have a legitimate expectation of protection of and respect for their *private life* and that they may legitimately expect to be protected against intrusion of their privacy or against the propagation of unfounded rumors relating to intimate aspects of their private life.⁷¹ Freedom of the press does not extend to idle gossip about intimate or extramarital relations merely serving to satisfy the curiosity of a certain readership and not contributing to any public debate in which the press has to fulfill its role of “public watchdog.”⁷² As the Court has accepted that also the *personal reputation* and the name, image or picture of individuals, including public figures, are part of private life as protected under Article 8 of the Convention,⁷³ the balancing between the right of privacy (Article 8) and the right to freedom of expres-

28274/08, *Heinisch v. Germany*; and ECtHR 6 October 2011, Case No. 32820/09, *Vellutini and Michel v. France*.

⁷¹ ECtHR 6 February 2001, Case No. 41205/98, *Tammer v. Estonia*; ECtHR 28 January 2003, Case No. 44647/98, *Peck v. UK*; ECtHR 30 March 2004, Case No. 53984/00, *Radio France a.o. v. France*; ECtHR 26 April 2004, Case No. 59320/00, *Von Hannover v. Germany*; ECtHR 17 October 2006, Case No. 71678/01, *Gourguénidzé v. Georgia*; ECtHR 9 November 2006, Case No. 64772/01, *Leempoel and S.A. Ciné Revue v. Belgium*; ECtHR 9 April 2009, Case No. 28070/06, *A. v. Norway*; ECtHR 16 April 2009, Case No. 34438/04, *Egeland and Hanseid v. Norway*; ECtHR 4 June 2009, Case No. 21277/05, *Standard Verlags GmbH (n° 2) v. Austria* and ECtHR 14 January 2014, Case No. 73579/10, *Ruusunen v. Finland* and ECtHR 14 January 2014, Case No. 69939/10, *Ojala and Etukeno Oy v. Finland*. Compare with ECtHR 19 September 2006, Case No. 42435/02, *White v. Sweden*; ECtHR 10 February 2009, Case No. 3514/02, *Eerikäinen and Others v. Finland*; ECtHR 28 April 2009, Case No. 39311/05, *Karakó v. Hungary*; ECtHR 21 September 2010, Case No. 34147/06, *Polanco Torres and Movilla Polanco v. Spain* and ECtHR 16 January 2014, Case No. 13258/09, *Lillo-Stenberg and Sæther v. Norway*. See also: ECtHR 25 November 2008, Case No. 36919/02, *Armonienė v. Lithuania* and ECtHR 25 November 2008, Case No. 23373/03, *Biriuk v. Lithuania*.

⁷² ECtHR 4 June 2009, Case No. 21277/05, *Standard Verlags GmbH (n° 2) v. Austria*. See, however, the dissenting opinion in this case arguing that the state of marriage of a head of state can be regarded as a topic of public interest, that the rumors concerning the presidential couple's marriage that were circulated were of some relevance and that all in all the impugned text remained within the limits of acceptable comment in a democratic society.

⁷³ According to the Court, “private life” extends to aspects relating to personal identity, such as a person's name or picture, and furthermore includes a person's physical and psychological integrity. The guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of “private life”: ECtHR 26 April 2004, Case No. 59320/00, *Von Hannover v. Germany*; and ECtHR 15 November 2007, Case No. 12556/03, *Pfeifer v. Austria*. Compare with ECtHR Grand Chamber 7 February 2012, Case Nos. 40660/08; and 60641/08, *Von Hannover (n° 2) v. Germany*.

sion (Article 10) became a difficult exercise, highly contested, including within the European Court.⁷⁴ The Court has more recently clarified that the inherent logic of Article 10 precludes the possibility of conflict with Article 8.⁷⁵ In the Court's view, the expression "the rights of others" mentioned in Article 10(2) encompasses the right to personal integrity and serves as a ground for limitation of freedom of expression in so far as the interference designed to protect private life is proportionate. A critical statement or a negative opinion about a politician, regarding facts and behavior in relation to his public activities, made during an election campaign in which he was a candidate, is not considered to have an impact on the private life of the person concerned. In such circumstances the Court is of the opinion that the alleged harm of the reputation as a politician is not a sustainable claim regarding the protection of the right to respect for personal integrity under Article 8 of the Convention. A limitation on freedom of expression for the sake of a politician would in such a context be disproportionate under Article 10 of the Convention.⁷⁶ The Court has accepted that it can reasonably be regarded as justified under the Convention to give more weight to the freedom of the press to impart information of public con-

⁷⁴ ECtHR 30 March 2004, Case No. 53984/00, *Radio France v. France*; ECtHR 26 April 2004, Case No. 59320/00, *Von Hannover v. Germany*; ECtHR 19 September 2006, Case No. 42435/02, *White v. Sweden*; ECtHR 17 October 2006, Case No. 71678/01, *Gourguénidzé v. Georgia*; ECtHR 9 November 2006, Case No. 72331/01, *Krone Verlags GMBH & CO KG (n° 4) v. Austria*; ECtHR 14 December 2006, Case No. 5433/02, *Shabanov and Tren v. Russia*; ECtHR Grand Chamber 22 October 2007, Case Nos. 21279/02; 36448/02, *Lindon, Otchakovsky-Laurens and July v. France*; ECtHR 15 November 2007, Case No. 12556/03, *Pfeifer v. Austria*; ECtHR 14 October 2008, Case No. 78060/01, *Petrina v. Romania*; ECtHR 25 November 2008, Case No. 36919/02, *Armonienė v. Lithuania*; ECtHR 25 November 2008, Case No. 23373/03, *Biriuk v. Lithuania*; ECtHR 9 April 2009, Case No. 28070/06, *A. v. Norway*; ECtHR 16 April 2009, Case No. 34438/04, *Egeland and Hanseid v. Norway*; ECtHR 4 June 2009, Case No. 21277/05, *Standard Verlags GmbH (n° 2) v. Austria*; and ECtHR 2 February 2012, Case No. 20240/082, *Růžový panter, o.s. v. Czech Republic*. Compare with ECtHR 10 February 2009, Case No. 3514/02, *Eerikäinen and Others v. Finland*; ECtHR 28 April 2009, Case No. 39311/05, *Karakó v. Hungary*; ECtHR 3 May 2011, Case No. 26125/04, *Sipos v. Romania*; and ECtHR 5 July 2011, Case No. 41588/05, *Avram v. Moldova*.

⁷⁵ For a thorough analysis on conflicts between human rights, including freedom of expression and the right of privacy, see E. Brems, ed., *Conflicts Between Fundamental Rights* (Antwerp: Intersentia, 2008) and S. Smet, *Resolving Conflicts between Human Rights. A Legal Theoretical Analysis in the Context of the ECHR* (Gent: Ghent University, 2014).

⁷⁶ ECtHR 28 April 2009, Case No. 39311/05, *Karakó v. Hungary*. See also S. Smet, "Freedom of Expression and the Right to Reputation: Human Rights in Conflict," *American University International Law Review* 26 (2010): 183–236. See also ECtHR 17 April 2014, Case No. 20981/10, *Mladina d.d. Ljubljana v. Slovenia* and ECtHR 17 April 2014, Case No. 5709/09, *Brosa v. Germany*.

cern than a politician's or public figure's interest in protecting his or her private life and correspondence.⁷⁷ In the case of *Von Hannover (no. 2) v. Germany* the Grand Chamber held unanimously that the publication of a picture of Princess Caroline of Monaco illustrating an article about the Principality of Monaco and the refusal by the German Courts to grant an injunction against it, did not amount to a violation of the right of privacy of the princess. The European Court is of the opinion that the princess, irrespective of the question to what extent she assumed official functions, is to be regarded as a public person. The article with the picture at issue did not solely serve entertainment purposes and there was nothing to indicate that the photo had been taken surreptitiously or by equivalent secret means such as to render its publication illegal.⁷⁸ In balancing the interests and rights guaranteed by Article 8 and 10, in *Mosley v. The United Kingdom* the European Court concluded that Article 8 did not impose a legally binding pre-notification requirement.⁷⁹

The Court has also clarified that liability for insult or defamation of governments, institutions or other state bodies is difficult to reconcile with the right to freedom of expression:

[A] fundamental requirement of the law of defamation is that in order to give rise to a cause of action the defamatory statement must refer to a particular person. If all State officials were allowed to sue in defamation in connection with any statement critical of administration of State affairs, even in situations where the official was not referred to by name or in an otherwise identifiable manner, journalists would be inundated with lawsuits. Not only would that result in an excessive and disproportionate burden being placed on the media, straining their resources and involving them in endless litigation, it would also inevitably have a chilling effect on the press in the performance of its task of purveyor of information and public watchdog.⁸⁰

⁷⁷ ECtHR (Decision) 16 June 2009, Case No. 38079/06, *Jonina Benediktsdóttir v. Iceland*. See also ECtHR Grand Chamber 21 January 1999, Case No. 29183/95, *Fressoz and Roire v. France*; ECtHR 19 September 2006, Case No. 42435/02, *White v. Sweden*; ECtHR 19 December 2006, Case No. 62202/00, *Radio Twist v. Slovakia*; ECtHR 10 February 2009, Case No. 3514/02, *Eerikäinen and Others v. Finland*; ECtHR 28 April 2009, Case No. 39311/05, *Karakó v. Hungary*; ECtHR 21 September 2010, Case No. 34147/06, *Polanco Torres and Movilla Polanco v. Spain*; and ECtHR Grand Chamber 7 February 2012, Case No. 39954/08, *Axel Springer AG v. Germany*.

⁷⁸ ECtHR Grand Chamber 7 February 2012, Case Nos. 40660/08 and 60641/08, *Von Hannover (n° 2) v. Germany* and ECtHR 19 September 2013, Case No. 8772/10, *Von Hannover (n° 3) v. Germany*.

⁷⁹ ECtHR 10 May 2011, Case No. 48009/08, *Mosley v. UK*.

⁸⁰ ECtHR 31 July 2007, Case No. 25968/02, *Dyuldin and Kislov v. Russia*. See also ECtHR 10 January 2012, Case No. 34702/07, *Standard Verlags GmbH (n° 3) v. Austria*.

Even a lenient sanction, an order to rectify or to pay damages in a civil case can amount in to the finding by the European Court of a violation of Article 10. When the Court is of the opinion that the reasons given by the domestic courts cannot be regarded as a sufficient justification for the interference with the applicant's right to freedom of expression and hence the domestic courts therefore failed to strike a fair balance between the competing interests of freedom of expression and the right of privacy or reputation of others, the finding of a violation of Article 10 is inevitable. Such a conclusion indeed cannot be affected by the fact that the proceedings complained of were civil rather than criminal in nature.⁸¹

A type of speech for which the European Court does not guarantee a high level of protection—or rather any protection at all—is “hate speech,” including incitement to violence, holocaust denial, neo-Nazi propaganda, incitement to discrimination or glorification of terrorism.⁸² In the case *Perinçek v. Switzerland* the Court has clarified however that there are limits in excluding “hate speech” from the protection of the European Convention. The case concerns the conviction in Switzerland of a Turkish politician for publicly denying the existence of a genocide against the Armenian people. On several occasions, Perinçek - at the time chairman of the Turkish Workers' Party - had described the Armenian genocide as “an international lie”. He had particularly insisted that whatever massacres had taken place did not meet the definition of genocide under international law. The Swiss courts found Perinçek guilty of racial discrimination. In its judgment of 17 December 2013, the Court considered the conviction of Perinçek as a violation of Article 10. The Court underlined that the free exercise of the right to openly discuss questions of a sensitive and controversial nature is one of the fundamental aspects of freedom of expression and distinguished a tolerant and pluralistic democratic society from a totalitarian or dictatorial regime. According to the Court, rejecting the legal characterisation as “genocide” of the 1915 events was not such as to incite hatred against the Armenian people. The Court was therefore of the opinion that Perinçek has not abused his right to freedom of expression in a way prohibited by Article 17 of the Convention. Nor was

⁸¹ ECtHR 17 April 2014, Case No. 20981/10, *Mladina d.d. Ljubljana v. Slovenia*.

⁸² See A. Weber, *Manuel sur le discours de haine* (Leiden: Martinus Nijhoff Publishers, 2009) and A. Buyse, “Dangerous Expressions: the ECHR, Violence and Free Speech”, *International and Comparative Law Quarterly* 2 (2014): 491-503. For a critical analysis, see S. Sottiaux, “‘Bad Tendencies’ in the ECtHR’s ‘Hate Speech’ Jurisprudence”, *European Constitutional Law Review* 1 (2011): 40-63. See, e.g., ECtHR (Decision) 23 June 2003, Case No. 65831/01, *Garaudy v. France*; ECtHR (Decision) 16 November 2004, Case No. 23131/03, *Norwood v. UK*; ECtHR (Decision) 20 February 2007, Case No. 35222/04, *Pavel Ivanov v. Russia*; ECtHR 2 October 2008, Case No. 36109/03, *Leroy v. France*; ECtHR 16 July 2009, Case No. 15615/07, *Féret v. Belgium* and ECtHR 9 February 2012, Case No. 1813/07, *Vejdeland a.o. v. Sweden*.

the conviction of Perinçek necessary in a democratic society. The Court held that historical research is by definition open to discussion and a matter of debate, without necessarily leading to final conclusions or absolute truths. In the remainder of its reasoning, the Court took the view that the Swiss authorities had failed to show how there was a social need in Switzerland to punish an individual for racial discrimination on the basis of declarations challenging only the legal characterisation as “genocide” of acts perpetrated on the territory of the former Ottoman Empire in 1915 and the following years. According to the Court such a pressing social need did exist regarding the denial of the Holocaust, but not with regard to the Armenian “genocide.”⁸³

C. Media, NGOs and Civil Society, All as “Public Watchdog”

The European Court has made clear that in a democratic society, in addition to the press, *non-governmental organizations (NGOs), campaign groups or organizations, with a message outside the mainstream* must be able to carry on their activities effectively and be able to rely on a high level of freedom of expression, as there is “a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.”⁸⁴ In a democratic society public authorities are to be exposed to *permanent scrutiny by citizens* and everyone has to be able

⁸³ ECtHR 17 December 2013, Case No. 27510/08, *Perinçek v. Switzerland* (referred to Grand Chamber). See on the “instrumentalization” of the Holocaust, ECtHR 8 November 2012, Case No. 43481/09, *PETA Deutschland v. Germany*.

⁸⁴ ECtHR 23 September 1998, Case No. 24838/94, *Steel and Others v. UK*. See also ECtHR 25 August 1998, Case No. 25181/94, *Hertel v. Switzerland*; ECtHR 28 June 2001, Case No. 24699/94, *VGT Verein gegen Tierfabriken v. Switzerland*; ECtHR 4 October 2007, Case No. 32772/02, *VGT Verein gegen Tierfabriken (n° 2) v. Switzerland*; ECtHR 27 May 2004, Case No. 57829/00, *Vides Aizsardzības Klubs v. Latvia*; and ECtHR 7 November 2006, Case No. 12697/03, *Mamère v. France*. See also ECtHR 29 October 1992, Case No. 14234/88 and 14235/88, *Open Door and Dublin Well Women v. Ireland*; ECtHR Grand Chamber 25 November 1999, Case No. 25594/94, *Hashman and Harrup v. UK*; ECtHR 20 September 2007, Case No. 57103/00, *Çetin and Şakar v. Turkey*; and ECtHR 3 February 2009, Case No. 31276/05, *Women on Waves v. Portugal*; ECtHR 14 September 2010, Case Nos. 6991/08 and 15084/08, *Hyde Park and Others (n° 5-6) v. Moldova*; ECtHR 1 December 2011, Case Nos. 8080/08 and 8577/08, *Schwabe and M.G. v. Germany*; ECtHR 12 June 2012, Case Nos. 26005/08 and 26160/08, *Tatár and Fáber v. Hungary*; ECtHR 26 November 2013, Case No. 3753/05, *Kudrevičius and others v. Lithuania* (referred to Grand Chamber) and ECtHR 15 May 2014, Case No. 19554/05, *Taranenko v. Russia*.

to draw the public's attention to situations that they consider unlawful.⁸⁵ The Court has also argued that freedom of expression is of major importance for persons belonging to *minority groups*.⁸⁶

Particular attention is paid to the public interest involved in the *disclosure of information*, contributing to debate on matters of public interest:

In a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence.⁸⁷

In such circumstances a journalist, a civil servant, an activist or a staff member of an NGO should not be prosecuted or sanctioned because of breach of confidentiality or the use of illegally obtained documents.⁸⁸ The Court has accepted that the interest in protecting the publication of information originating from a source which obtained and retransmitted the information unlawfully may in certain circumstances outweigh those of an individual or an entity, private or public, in maintaining the confidentiality of the information. A newspaper that has published illegally gathered emails between two public figures, directly related to a public discussion on a matter of serious public concern, can be shielded by Article 10 of the Convention against claims based on the right of privacy as protected under Article 8 of the Convention.⁸⁹

In its Grand Chamber judgment in *Stoll v. Switzerland*, the Court confirmed that

⁸⁵ ECtHR 27 May 2004, Case No. 57829/00, *Vides Aizsardzības Klubs v. Latvia*. See also ECtHR 12 June 2012, Case. Nos. 26005/08 and 26160/08, *Tatár and Fáber v. Hungary*.

⁸⁶ ECtHR 17 February 2004, Case No. 44158/98, *Gorzelik v. Poland*.

⁸⁷ ECtHR Grand Chamber 12 February 2008, Case No. 14277/04, *Guja v. Moldova* and ECtHR 8 January 2013, Case No. 40238/02, *Bucur and Toma v. Romania*.

⁸⁸ ECtHR Grand Chamber 21 January 1999, Case No. 29183/95, *Fressoz and Roire v. France*; ECtHR 25 April 2006, Case No. 77551/01, *Dammann v. Switzerland*; ECtHR 7 June 2007, Case No. 1914/02, *Dupuis and Others v. France*; ECtHR 26 July 2007, Case No. 64209/01, *Peev v. Bulgaria*; and ECtHR Grand Chamber 12 February 2008, Case No. 14277/04, *Guja v. Moldova*. See also ECtHR 19 December 2006, Case No. 62202/00, *Radio Twist v. Slovakia*; and ECtHR 28 June 2011, Case No. 28439/08, *Pinto Coelho v. Portugal*.

⁸⁹ ECtHR (Decision) 16 June 2009, Case No. 38079/06, *Jonina Benediktsdóttir v. Iceland*. See also ECtHR Grand Chamber 21 January 1999, Case No. 29183/95, *Fressoz and Roire v. France*; and ECtHR 19 December 2006, Case No. 62202/00, *Radio Twist v. Slovakia*.

press freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature. The conviction of a journalist for disclosing information considered to be confidential or secret may discourage those working in the media from informing the public on matters of public interest. As a result the press may no longer be able to play its vital role as “public watchdog” and the ability of the press to provide accurate and reliable information may be adversely affected.⁹⁰

In cases in which journalists reported about confidential information in a sensationalist way⁹¹ or in which the revealed documents did not concretely or effectively contribute to public debate or only concerned information about the private life of the persons concerned,⁹² the Court accepted (proportionate) interferences in their freedom of expression.

In the Grand Chamber judgment in *Guja v. Moldova*, the Court recognized the need of *protection of whistleblowers* by Article 10 of the Convention. The Court noted

that a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgation or publication corresponds to a strong public interest. The Court thus considers that the signaling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large.

⁹⁰ ECtHR Grand Chamber 10 December 2007, Case No. 69698/01, *Stoll v. Switzerland*. See also ECtHR Grand Chamber 27 March 1996, Case No. 17488/90, *Goodwin v. UK*; and ECtHR Grand Chamber 21 January 1999, Case No. 29183/95, *Fresoz and Roire v. France*.

⁹¹ ECtHR Grand Chamber 10 December 2007, Case No. 69698/01, *Stoll v. Switzerland*.

⁹² ECtHR 9 November 2006, Case No. 64772/01, *Leempoel and S.A. Ciné Revue v. Belgium*; and ECtHR 3 February 2009, Case No. 30699/02, *Marin v. Romania*. See also ECtHR 14 March 2002, Case No. 46833/99, *De Diego Nafria v. Spain* and ECtHR Grand Chamber 17 December 2004, Case No. 33348/96, *Cumpănă and Mazăre v. Romania*. See also ECtHR 14 January 2014, Case No. 73579/10, *Ruusunen v. Finland* and ECtHR 14 January 2014, Case No. 69939/10, *Ojala and Etukeno Oy v. Finland*.

Although disclosure should be made in the first place to the person's superior or other competent authority or body, the Court accepted that when such a practice is clearly impractical, the information could, as a last resort, be disclosed to the public. The Court held that the dismissal of a civil servant for leaking two confidential letters from the public prosecutor's office to the press was in breach of Article 10 of the Convention, also referring to the *serious chilling effect* of the applicant's dismissal for other civil servants or employees, discouraging them from reporting any misconduct.⁹³ In *Bucur and Thoma v. Romania* the Court considered that the general interest in the disclosure of information revealing illegal activities within the Romanian Intelligence Services (RIS) was so important in a democratic society that it prevailed over the interest in maintaining public confidence in that institution. The Court observed that the information about the illegal telecommunication surveillance of journalists, politicians and business men that had been disclosed to the press affected the democratic foundations of the State. Hence it concerned very important issues for the political debate in a democratic society, in which public opinion had a legitimate interest. The fact that the data and information at issue were classified as 'ultra-secret' was not a sufficient reason to interfere with the whistle-blower's right in this case. The conviction of Bucur for the disclosure of information to the media about the illegal activities of RIS was considered as a violation of Article 10 ECHR. In its judgment the Court also relied on Resolution 1729(2010) of the Parliamentary Assembly of the Council of Europe on protecting whistle-blowers.⁹⁴

Especially in cases where *information is published on alleged corruption, fraud or illegal activities* in which politicians, civil servants or public institutions are involved, journalists, publishers, media and NGOs can count on the highest standards of protection of freedom of expression. The Court has emphasized that "in a democratic state governed by the rule of law the

⁹³ ECtHR Grand Chamber 12 February 2008, Case No. 14277/04, *Guja v. Moldova*. See also ECtHR 5 October 2006, Case No. 14881/03, *Zakharov v. Russia*; ECtHR 26 July 2007, Case No. 64209/01, *Peev v. Bulgaria*; ECtHR 13 November 2008, Case Nos. 64119/00; 76292/01, *Kayasu v. Turkey*; ECtHR 13 January 2009, Case No. 39656/03, *Ayhan Erdoğan v. Turkey*; ECtHR 19 February 2009, Case No. 4063/04, *Marchenko v. Ukraine*; ECtHR 26 February 2009, Case No. 29492/05, *Kudeshkina v. Russia*; ECtHR 16 July 2009, Case No. 20436/02, *Wojtas-Kaleta v. Poland*; ECtHR 31 March 2011, Case No. 6428/07, *Siryk v. Ukraine*; ECtHR 21 July 2011, Case No. 28274/08, *Heinisch v. Germany*; ECtHR 18 October 2011, Case No. 10247/09, *Sosinowska v. Poland* and ECtHR 8 January 2013, Case No. 40238/02, *Bucur and Toma v. Romania*.

⁹⁴ ECtHR 8 January 2013, Case No. 40238/02, *Bucur and Toma v. Romania*. Notice that in some other cases the Court showed more respect for secret, classified military information: ECtHR 22 October 2009, Case No. 69519/01, *Pasko v. Russia*. In this case the ECtHR failed to apply the Guja-criteria, while the information at issue concerned serious environmental issues, related to nuclear pollution.

use of improper methods by public authority is precisely the kind of issue about which the public has the right to be informed.”⁹⁵ The Court expressed the opinion that “the press is one of the means by which politicians and public opinion can verify that public money is spent according to the principles of accounting and not used to enrich certain individuals.”⁹⁶ Defamation laws and proceedings cannot be justified if their purpose or effect is to prevent legitimate criticism of public officials or the exposure of official wrongdoing or corruption. A right to sue in defamation for the reputation of officials could easily be abused and might prevent free and open debate on matters of public interest or scrutiny of the spending of public money.⁹⁷

An interference by public authorities by means of prosecution or other judicial measures with regard to the *journalist’s research and investigative activities* calls for the most scrupulous examination from the perspective of Article 10 of the Convention.⁹⁸ It is based on this perspective that *journalistic sources* enjoy a very high level of protection in terms of Article 10 of the Convention. According to the Court,

protection of journalistic sources is one of the basic conditions for press freedom, as is recognised and reflected in various international instruments including the Committee of Ministers Recommendation. . . . Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that

⁹⁵ ECtHR 22 November 2007, Case No. 64752/01, *Voskuil v. The Netherlands*.

⁹⁶ ECtHR 14 November 2008, Case No. 9605/03, *Krone Verlag GmbH & Co (n° 5) v. Austria*.

⁹⁷ ECtHR 9 June 2009, Case No. 17095/03, *Cihan Özturk v. Turkey*.

⁹⁸ See ECtHR 24 February 1997, Case No. 19983/92, *De Haes and Gijssels v. Belgium*; ECtHR Grand Chamber 21 January 1999, Case No. 29183/95, *Fressoz and Roire v. France*; ECtHR Grand Chamber 20 May 1999, Case No. 21980/93, *Bladet Tromsø and Stensaas v. Norway*; ECtHR 3 October 2000, Case No. 34000/96, *Du Roy and Malaurie v. France*; ECtHR 29 March 2001, Case No. 38432/97, *Thoma v. Luxembourg*; ECtHR 25 June 2002, Case No. 51279/99, *Colombani and Others v. France*; ECtHR 27 May 2004, Case No. 57829/00, *Vides Aizsardzibas Klubs v. Latvia*; ECtHR 19 December 2006, Case No. 62202/00, *Radio Twist v. Slovakia*; ECtHR 29 March 2005, Case No. 72713/01, *Ukrainian Media Group v. Ukraine*; and ECtHR 7 June 2007, Case No. 1914/02, *Dupuis and Others v. France*. See also ECtHR 16 July 2013, Case No. 73469/10, *Nagla v. Latvia*.

freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.⁹⁹

Searches in news rooms and confiscations of journalistic material in order to reveal the identity of an informant can hardly be justified from this perspective. On several occasions, the European Court was of the opinion that searches of media offices, the home and place of work of journalists or reporters amounted to a violation of Article 10 of the Convention.¹⁰⁰

In cases where journalists or media did not succeed in giving *reliable or relevant evidence* for their (serious) allegations, insinuations or accusations, the Court accepts convictions and (proportionate) sanctions imposed by the national authorities as not being in breach with Article 10 of the Convention.¹⁰¹ The requirement that a journalist needs to prove that the alle-

⁹⁹ ECtHR Grand Chamber 27 March 1996, Case No. 17488/90, *Goodwin v. UK*. See also ECtHR (Decision) 8 December 2005, Case No. 40485/02, *Nordisk Film & TV A/S v. Denmark*; and ECtHR 31 May 2007, Case No. 40116/02, *Šečić v. Croatia*.

¹⁰⁰ ECtHR 23 February 2003, Case No. 51772/99, *Roemen and Schmit v. Luxembourg*; ECtHR 15 July 2003, Case No. 33400/96, *Ernst and Others v. Belgium*; ECtHR 22 November 2007, Case No. 64752/01, *Voskuil v. The Netherlands*; ECtHR 27 November 2007, Case No. 20477/05, *Tillack v. Belgium*; ECtHR 15 December 2009, Case No. 821/03, *Financial Times Ltd. a.o. v. UK*; ECtHR Grand Chamber 14 September 2010, Case No. 38224/03, *Sanoma Uitgevers BV v. The Netherlands*; ECtHR 12 April 2012, Case No. 30002/08, *Martin a.o. v. France*; ECtHR 28 June 2012, Case Nos. 15054/07 and 15066/07, *Ressiot a.o. v. France*; ECtHR 22 November 2012, Case No. 39315/06, *Telegraaf Media Nederland Landelijke Media N.V. and Others v. The Netherlands*; ECtHR 18 April 2013, Case No. 26419/10, *Saint-Paul Luxembourg S.A. v. Luxembourg*; and ECtHR 16 July 2013, Case No. 73469/10, *Nagla v. Latvia*. See also Committee of Ministers of the Council of Europe, Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information, 8 March 2000, www.coe.int/t/dghl/standardsetting/media/; Parliamentary Assembly of the Council of Europe, Recommendation 1950 (2011) on the Protection of Journalists' Sources, 25 January 2011, <http://assembly.coe.int/mainf.asp?Link=/documents/adoptedtext/ta11/errec1950.htm>; D. Banisar, *Silencing Sources: An International Survey of Protections and Threats to Journalists' Sources* (2007), www.privacyinternational.org; and D. Voorhoof, ed., *European Media Law: Collection of Materials, 2012–2013* (Gent: Knops Publishing, 2012), 287–306.

¹⁰¹ See ECtHR 26 April 1995, Case No. 15974/90, *Prager and Oberschlick v. Austria*; ECtHR 27 June 2000, Case No. 28871/95, *Constantinescu v. Romania*; ECtHR 7 May 2002, Case No. 46311/99, *McVicar v. UK*; ECtHR Grand Chamber 6 May 2003, Case No. 48898/99, *Perna v. Italy*; ECtHR 30 March 2004, Case No. 53984/00, *Radio France v. France*; ECtHR 29 June 2004, Case No. 64915/01, *Chauvy v. France*; ECtHR Grand Chamber 17 December 2004, Case No. 33348/96, *Cumpănă and Mazăre v. Romania*; ECtHR Grand Chamber 17 December 2004, Case No. 49017/99, *Pedersen and Baadsgaard v. Denmark*; ECtHR 21 December

gations made in an article were “substantially true” on the balance of probabilities, constitutes a justified restriction on the right to freedom of expression under Article 10(2) of the Convention.¹⁰² In some cases the obvious lack of evidence of published allegations made the Court even decide on the (manifest) inadmissibility of a complaint under Article 10 of the Convention.¹⁰³ On the other hand, the Court has also considered that, as part of their role as a “public watchdog,” the media’s reporting on “‘stories’ or ‘rumours’—emanating from persons other than an applicant—or ‘public opinion’” is to be protected.¹⁰⁴ The Court at several occasions accepted that value judgments, allegations or statements only had “a slim factual basis” or that it was sufficient that there was “no proof the description of events given in the articles was totally

2004, Case No. 61513/00, *Busuioc v. Moldova*; ECtHR 31 January 2006, Case No. 53899/00, *Stângu and Scutelnicu v. Romania*; ECtHR 14 February 2008, Case No. 36207/03, *Rumyana Ivanova v. Bulgaria*; ECtHR 22 May 2008, Case No. 17550/03, *Alithia Publishing Company Ltd. & Constantinides v. Cyprus*; ECtHR 8 July 2008, Case No. 24261/05, *Backes v. Luxembourg*; ECtHR 29 July 2008, Case No. 22824/04, *Flux (n° 6) v. Moldova*; ECtHR 16 September 2008, Case No. 36157/02, *Cuc Pascu v. Romania*; ECtHR 14 October 2008, Case No. 78060/01, *Petrina v. Romania*; ECtHR 18 December 2008, Case No. 35877/04, *Mahmudov and Agazade v. Azerbaijan*; ECtHR 5 February 2009, Case No. 42117/04, *Brunet-Lecomte and Others v. France*; ECtHR 21 June 2011, Case No. 35105/04, *Kania and Kittel v. Poland*; ECtHR 24 July 2012, Case No. 46712/06, *Ziemiński v. Poland*; ECtHR 2 February 2012, Case No. 20240/08, *Růžový panter, o.s. v. Czech Republic*; ECtHR 28 March 2013, Case No. 14087/08, *Novaya Gazeta and Borodyanskiy v. Russia*; ECtHR 14 January 2014, Case No. 22231/05, *Lavric v. Romania*; ECtHR 30 January 2014, Case No. 34400/10, *De Lesquen du Plessis-Casso (n° 2) v. France* and ECtHR 29 April 2014, Case No. 23605/09, *Salumäki v. Finland*. . In some cases the Court found no violation of Article 10, while it accepted that the applicant had not been guaranteed a fair trial and that there had been a violation of Article 6(1) of the Convention: see, e.g., ECtHR 27 June 2000, Case No. 28871/95, *Constantinescu v. Romania*; and ECtHR 4 November 2008, Case No. 42512/02, *Mihaiu v. Romania*.

¹⁰² ECtHR 7 May 2002, Case No. 46311/99, *McVicar v. UK*; and ECtHR Grand Chamber 17 December 2004, Case No. 49017/99, *Pedersen and Baadsgaard v. Denmark*.

¹⁰³ See, e.g., ECtHR (Decision) 4 April 2006, Case No. 33352/02, *László Keller v. Hungary*; ECtHR (Decision) 15 June 2006, Case No. 6928/04 and 6929/04, *Corneliu Vadim Tudor v. Romania*; ECtHR (Decision) 8 February 2007, Case No. 3540/04, *Falter Zeitschriften GmbH v. Austria*; ECtHR (Decision) 21 October 2008, Case No. 20953/06, *Tomasz Wolek, Rafal Kasprów and Jacek Łęski v. Poland* and ECtHR (Decision) 21 October 2008, Case No. 37115/06, *Vittorio Sgarbi v. Italy*. See also ECtHR (Decision) 16 October 2001, Case No. 45710/99, *Verdens Gang and Kari Aarsted Aase v. Norway*; ECtHR (Decision) 21 February 2002, Case No. 43525/98, *Gaudio v. Italy*; ECtHR (Decision) 20 November 2012, Case No. 9283/05, *Dunca and SC Nord Vest Press SRL v. Romania* and ECtHR 15 January 2013, Case No. 29672/05, *Ciuviță v. Romania*.

¹⁰⁴ See, e.g., ECtHR 25 June 1992, Case No. 13778/88, *Thorgeir Thorgeirson v. Iceland*; and ECtHR 9 June 2009, Case No. 17095/03, *Cihan Öztürk v. Turkey*.

untrue,” or that the “opinions were based on facts which have not been shown to be untrue.”¹⁰⁵ The Court accepted that value judgments and criticism can be based on “unconfirmed allegations or rumours.”¹⁰⁶ The Court does not accept the reasoning of domestic courts that allegations of serious misconduct leveled against individuals or public persons should first have been proven in criminal proceedings.¹⁰⁷ In the *Kasabova* case the Court clarified that “while a final conviction in principle amounts to incontrovertible proof that a person has committed a criminal offence, to circumscribe in such a way the manner of proving allegations of criminal conduct in the context of a libel case is plainly unreasonable, even if account must be taken, as required by Article 6(2), of that person’s presumed innocence.”¹⁰⁸ Describing an act or behavior of a politician as “illegal” is to be considered as expressing a personal legal opinion amounting to a value judgment of which the accuracy cannot be required to be proven.¹⁰⁹ Media applying the standards of journalistic ethics or journalists acting in consonance with the principles of “responsible journalism” are strongly protected by Article 10 of the Convention.¹¹⁰ This does not imply that a journalist must act in compliance with norms of good journalistic practice in all circumstances in order to be shielded by Article 10 of the Convention.

¹⁰⁵ See, e.g., ECtHR 25 November 1999, Case No. 23118/93, *Nilsen and Johnsen v. Norway*; ECtHR 28 September 1999, Case No. 28114/95, *Dalban v. Romania*; ECtHR 26 February 2002, Case No. 29271/95, *Dichand and Others v. Austria*; and ECtHR 23 October 2007, Case No. 28700/03, *Flux and Samson v. Moldova*.

¹⁰⁶ ECtHR 27 November 2007, Case No. 42864/05, *Timpul Info-Magazin and Anghel v. Moldova*. See also ECtHR 9 June 2009, Case No. 17095/03, *Cihan Öztürk v. Turkey*. The Court in this case however also considered that “there was a sufficient factual basis for the applicant to make a critical analysis of the situation and to raise questions about the restoration project, since the authorities had already brought criminal proceedings against the applicant for breach of duty.”

¹⁰⁷ See ECtHR 25 November 1999, Case No. 23118/93, *Nilsen and Johnsen v. Norway*; ECtHR 29 July 2008, Case No. 22824/04, *Flux (n° 6) v. Moldova*; ECtHR 14 October 2008, Case No. 34434/02, *Folea v. Romania*; ECtHR 14 October 2008, Case No. 37406/03, *Dyundin v. Russia*; ECtHR 23 October 2008, Case No. 14888/03, *Godlevskiy v. Russia*; and ECtHR 2 April 2009, Case No. 24444/07, *Kydonis v. Greece*. Compare with ECtHR 27 June 2000, Case No. 28871/95, *Constantinescu v. Romania*; and ECtHR 14 October 2008, Case No. 78060/01, *Petrina v. Romania*. See also ECtHR 17 April 2014, Case No. 5709/09, *Brosa v. Germany*.

¹⁰⁸ ECtHR 19 April 2011, Case No. 22385/03, *Kasabova v. Bulgaria*.

¹⁰⁹ ECtHR 27 May 2004, Case No. 57829/00, *Vides Aizsardzibas Klubs v. Latvia*. See also ECtHR 16 November 2004, Case No. 56767/00, *Selistö v. Finland*; and ECtHR 16 November 2004, Case No. 53678/00, *Karhuvaara and Iltalehti v. Finland*. See also ECtHR 17 April 2014, Case No. 5709/09, *Brosa v. Germany*.

¹¹⁰ ECtHR 23 October 2007, Case No. 28700/03, *Flux and Samson v. Moldova*; ECtHR 27 November 2007, Case No. 42864/05, *Timpul Info-Magazin and Anghel v. Moldova*; and ECtHR 10 January 2012, Case No. 34702/07, *Standard Verlags GmbH v. Austria*.

In some cases the Court was of the opinion that, although it would have been “advisable” for a newspaper and its journalists to have obtained comments beforehand from a person that was criticized in the newspaper for being involved in fraud and improper use of public funding, “the mere fact that it had not done so is not sufficient to hold that the interference with the applicant company’s right to freedom of expression was justified.”¹¹¹

D. Toward a Right of Access to Official Documents

An important new development is the Court’s recent shift toward approaching *access to public documents* from the perspective of Article 10 of the Convention. For a long time, the Court refused to apply Article 10 in cases of refusals of access to public documents.¹¹² The However, in a 2007 judgment the Court expressed its opinion that “particularly strong reasons must be provided for any measure affecting this role of the press and limiting access to information which the public has the right to receive,”¹¹³ implicitly recognizing at least a right of access to information. In the spring of 2009 the Court delivered two important judgments in which it recognized the right of access to official documents. The Court made clear that when public bodies hold information that is needed for public debate, the refusal to provide documents in this matter to those who are requesting access is a violation of the right to freedom of expression and information as guaranteed under Article 10 of the Convention. In *TASZ v. Hungary* the Court’s judgment mentioned the “censorial power of an information monopoly” when public bodies refuse to release information needed by the media or civil society organizations to perform their “watchdog” function. It also considered that the State had an obligation not to impede the flow of information sought by a journalist or an interested citizen. The Court referred to its consistent case law in which it has recognized that the public has a right to receive information of general interest and that the most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society’s “watchdogs,” in the public

¹¹¹ ECtHR 14 November 2008, Case No. 9605/03, *Krone Verlag GmbH & Co (n° 5) v. Austria*. See also ECtHR 10 January 2012, Case No. 34702/07, *Standard Verlags GmbH (n° 3) v. Austria*.

¹¹² The Court got on a new track in ECtHR (Decision) 10 July 2006, Case No. 19101/03, *Sdružení Jihočeské Matky v. Czech Republic*. See also W. Hins and D. Voorhoof, “Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights,” *European Constitutional Law Review* 3 (2007): 114–26.

¹¹³ ECtHR 27 November 2007, Case No. 42864/05, *Timpul Info-Magazin and Anghel v. Moldova*.

debate on matters of legitimate public concern, even when those measures merely make access to information more cumbersome. The Court emphasized once more that the function of the press, including the creation of forums for public debate, is not limited to the media or professional journalists. Indeed, in the present case, the preparation of the forum of public debate was conducted by a non-governmental organization. The Court recognized civil society's important contribution to the discussion of public affairs and qualified the applicant association, which is involved in human rights litigation, as a social "watchdog." In these circumstances the applicant's activities warranted Convention protection similar to that afforded to the press. Furthermore, given the applicant's intention to impart the requested information to the public, thereby contributing to the public debate concerning legislation on drug-related offences, its right to impart information was clearly impaired.¹¹⁴

In *Kenedi v. Hungary* the European Court held unanimously that there had been a violation of the Convention, on account of the excessively long proceedings—over ten years—with which Mr. Kenedi sought to gain and enforce his access to documents concerning the Hungarian secret services. The Court also reiterated that "access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression." The Court noted that Mr. Kenedi had obtained a court judgment granting him access to the documents in question, following which the domestic courts had repeatedly found in his favor in the ensuing enforcement proceedings. The administrative authorities had persistently resisted their obligation to comply with the domestic judgment, thus hindering Mr. Kenedi's access to documents he needed to write his study. The Court concluded that the authorities had acted arbitrarily and in defiance of domestic law and it held, therefore, that the authorities had misused their powers by delaying Mr. Kenedi's exercise of his right to freedom of expression, in violation of Article 10.¹¹⁵

More recently the European Court has reiterated that "the gathering of information is an essential preparatory step in journalism and is an inherent, protected part of press freedom" and that "obstacles created in order to hinder access to information which is of public interest may discourage those working in the media or related fields from pursuing such matters. As a result,

¹¹⁴ ECtHR 14 April 2009, Case No. 37374/05, *Társaság a Szabadságjogokért v. Hungary*; and ECtHR 26 May 2009, Case No. 31475/05, *Kenedi v. Hungary*.

¹¹⁵ ECtHR 26 May 2009, Case No. 31475/05, *Kenedi v. Hungary*. The Court came to the conclusion that in this case Article 13 (effective remedy) had also been violated since the Hungarian system did not provide for an effective way of remedying the violation of the freedom of expression in this situation. The Court found that the procedure available in Hungary at the time and designed to remedy the violation of Kenedi's Article 10 rights had been proven ineffective. There had, therefore, been a violation of Article 13 read in conjunction with Article 10 of the Convention.

they may no longer be able to play their vital role as “public watchdogs,” and their ability to provide accurate and reliable information may be adversely affected.”¹¹⁶ Referring to *TASZ v. Hungary*, the European Court stated explicitly “that the notion of ‘freedom to receive information’ embraces a right of access to information.” The Court is of the opinion that as the applicant NGO, Youth Initiative for Human Rights, was obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate, there has been an interference with its right to freedom of expression. The Court found that the restrictions imposed by the Serbian intelligence agency, resulting in a refusal to give access to public documents, did not meet the criterion as being prescribed by law, and therefore violated Article 10 of the Convention.

In another judgment on the right of access to public documents the Strasbourg Court has further clarified and expanded the scope of application of Article 10 of the Convention. The applicant in this case was an NGO, the Austrian association for the preservation, strengthening and creation of an economically sound agricultural and forestry land ownership (OVESSG). The Court considers that the refusal to give OVESSG access to the requested documents amounted to an interference with its rights under Article 10, as the association was involved in the legitimate gathering of information of public interest with the aim of contributing to public debate. The unconditional refusal by the Austrian regional authorities to give access to a series of documents thus made it impossible for OVESSG to carry out its research and to participate in a meaningful manner in the legislative process concerning amendments of real property transaction law in the region. The refusal to give access to the requested documents amounted to a violation of Article 10 of the Convention.¹¹⁷ The Court’s recognition of the applicability of the right to freedom of expression and information in matters of access to official documents is undoubtedly an important new development which further expands the scope of application of Article 10 of the Convention.¹¹⁸

¹¹⁶ ECtHR 25 June 2013, Case No. 48135/06, *Youth Initiative for Human Rights v. Serbia*.

¹¹⁷ ECtHR 28 November 2013, Appl. No. 39534/07, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria*.

¹¹⁸ See also P. Tiilikka, “Access to Information as a Human Right in the Case Law of the European Court of Human Rights” *Journal of Media Law* 5 (2013): 79-103 and the European Convention on Access to Official Documents, 18 June 2009, CETS nr. 205, www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=205&CM=8&DF=24/09/2012&CL=ENG.

VI. Conclusions and Challenges

It is striking how the cases of freedom of expression dealt with by the European Court often reflect the historical and contemporary “traumas” in the member states. Most cases against Turkey are related to the Kurdish question, criticizing the military or politicians, or discuss terrorism or freedom of expression in relation to religion. Many cases against Austria are about journalistic reporting and political debate on the alleged neo-Nazi sympathies of politicians and racism or xenophobia in Austria. Cases against Italy are linked to the fight against the Mafia and the role of the judiciary and politicians in this context. An important case deals with the impact of Berlusconi’s media imperium on the allocation of broadcasting licenses. Cases against France refer to aspects of collaboration and resistance during the Second World War, concern public debate or reporting on terrorism in the Basque region or Corsica, or refer to the role of France in the civil war in Algeria or the nuclear fallout in France due to the Chernobyl accident. Other cases deal with the role of the National Front and its (former) leader Jean-Marie Le Pen, while some cases in France have a high “presidential” character or concern the doping in the Tour de France. Cases in Russia, Moldova, Ukraine, Azerbaijan, Bulgaria, Serbia and Romania are often about corruption and fraud, or about (former) secret police or intelligence services. A major case against Norway concerns seal hunting. The Danish *Jersild* case had to do with rising xenophobia in Copenhagen and a Swedish case was linked to the investigation of the 1986 murder of Swedish Prime Minister Olof Palme. Cases in Poland, Slovakia and Hungary often concern defamation of politicians, indicating some immaturity with robust debate on political issues in a democracy. Some cases against Germany concerned freedom of expression and “*Berufsverbot*” of members of communist or national-socialist parties, or are related to neo-Nazi organizations or references to the Holocaust, while cases against the United Kingdom concerned contempt of court, secret intelligence, libel or CCTV (closed-circuit television) and the right of privacy of celebrities. The Court’s judgments against Belgium are related to cases of child abuse, the case of Marc Dutroux, the murder of the chairman of the Socialist Party, alleged corruption and bribery in the surroundings of the European Commission in Brussels, and incitement to racism and discrimination by a leader of a far right political party. A major case against Switzerland concerned a leaked confidential letter of an ambassador on the issue of financial compensations to Jewish families for unclaimed assets deposited at Swiss banks during the Holocaust. It is also striking that many cases are related to expressions, information and opinions defending respect for human rights, democracy, health and environment. In other words, in many cases citizens, journalists, media or NGOs were victims in their own country of an illegitimate interference in their right to freedom of expression contributing to a more sustainable

society. It is obvious that in most of the judgments the Strasbourg Court has emphasized, definitely more than the national authorities, that the impugned press articles, publications or statements needed protection since they contributed to public debate, and sometimes even to the transition and development toward democracy. The European Court's case law clearly reflects the idea that freedom of critical expression, pluralist media and independent journalistic reporting can help democracy take root and develop in a country.

Over the years, Article 10 of the Convention has been incorporated more and more in the domestic law and practice of (most of) the member states. Parliaments, legislators, governments, courts, judges, public prosecutors, police officers and administrative bodies are taking the right to freedom of expression and information in its various dimensions and consequences more seriously. NGOs advocating freedom of expression, journalists' associations, legal journals, law firms, law faculties in their education and research programs, newspapers and websites are all contributing to a better understanding and to a committed awareness of the Strasbourg Court's case law in the area of freedom of expression and media regulation. Press freedom and freedom of expression will, however, never be fully realized: the tension between the principle of freedom of expression in a democracy and the need for public or private interests to restrict this freedom results in a permanent struggle to find a fair balance between the competing interests and values concerned. Freedom of expression is, however, a precondition for a democratic society. The inherent paradox of Article 10 is that freedom of expression is considered a necessity in a democratic society, while at the same time the restrictions and limitations on that freedom are justified as well as being necessary in a democratic society. According to the jurisprudence of the European Court in Strasbourg, however, the test of whether a restriction or sanction is necessary in a democratic society needs to be a very strict one.

The challenge for the future is to bring more European Convention member states in line with the European Court's case law and to inspire, influence or persuade other states and regions in the world to upgrade the freedom of expression of its citizens, to protect the freedom of newsgathering and independent and critical reporting by journalists and NGOs and to create more access to information and transparency on matters of interest for society. Protecting and effectively guaranteeing these rights is a crucial step toward developing the quality of democracy, stimulating diversity and tolerance, guaranteeing the respect for human rights and ultimately helping to realize a more sustainable, and hence a better, world to live in. The case law of the European Court that applies Article 10 of the European Convention can be considered as setting an authoritative international standard regarding the protection of freedom of expression and information. Hence, also from a global perspective, it is very important to uphold, consolidate and further develop the high standards guaranteeing this right.

Jurisprudential Advances and Persistent Challenges for Freedom of Expression in the Americas¹

CATALINA BOTERO MARINO

I. Introduction

During the final decades of the 20th century, there was a true democratic rebirth in the Americas. This new era was characterized by the end of the military dictatorships, the decline of the Cold War culture, and the emergence of new constitutional hopes. Nevertheless, in certain areas the legal and cultural legacy of the authoritarian regimes still persisted and its influence had managed to make its way into some of the systems where democratic forms of government had been maintained. This influence was particularly notable in some areas, and such was the case of the right to freedom of expression.

At the beginning of the 1990s, it was not unusual to have laws that established the prior state censorship of books, films and works of art, as a manner of protecting *social morals, public order and good manners*. Journalists and critical media had few guarantees for exercising their right to express themselves freely when their thoughts or opinions might be offensive or shocking to those who held public office, to powerful sectors of society or to the majority of the population.

¹ This chapter is a summarized and updated version of “A Hemispheric Agenda for the Defense of Freedom of Expression,” which was approved in February 2009 in plenary session by the Inter-American Commission on Human Rights and included in its annual report: IACHR, *2008 Annual Report*, OEA/Ser.L/V/II.134 Doc. 5, 25 February 2009, vol. 2, chapter 4, <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>.

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Little more than a decade ago, those who maintained that the offense of *desacato* was the only way to control *violence against the State* and maintain the majesty, dignity and legitimacy of its institutions were not minority voices. As such, the culture of secrecy prevailed, based on a premodern idea that the State's institutions, by virtue of simply being what they were, were worthy of the people's full trust and support. According to this view, government officials should be able to work *in peace* without the bothersome demands of transparency or requests for information, which *were time-consuming, required funds, and contributed little to the country's progress*.

There were also other destructive legacies of the authoritarian doctrines, including dramatically restrictive press laws and arbitrary systems for the allocation of public goods and resources fundamental to the exercise of freedom of expression, such as the distribution of government advertising, television and radio frequencies or subsidies for culture and the arts.

Finally, one of the most serious attacks on freedom of expression took the form of absolute impunity for crimes that had been committed with the intention of silencing a dissident opinion, an inconvenient point of view, a different way of seeing and thinking about the State and society—systematic crimes that had been committed against young students, labor and peasant leaders, indigenous people, journalists, and anyone who dared to think differently or to react against the arbitrariness of the State. Ten years ago, these victims of the worst form of censorship did not occupy an important place on the political agenda.

The 20th century came to a close with a democratically renewed region. Nevertheless, at least on the topic of freedom of expression, there was still much to be done. It was within this context, marked by an authoritarian cultural and legal heritage, but also by the hope engendered by the end of the Cold War and the new momentum of our constitutional democracies, that the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR) was created.

Currently, progress in the area of freedom of expression, although insufficient, is notable: freedom of expression is enshrined in nearly all of their constitutions, and laws and government programs have incorporated and implemented different aspects of this right into their domestic systems. In the majority of States, mechanisms of direct censorship are virtually nonexistent. Several States have repealed the offenses of *desacato* and criminal defamation (in its numerous manifestations)²; others have added to or updated their laws with the objective of guaranteeing access to

² Argentina, Paraguay, Costa Rica, Peru, Panama, El Salvador, Honduras, Guatemala, among others, have repealed the offense of *desacato* from their laws. Argentina, Mexico and Panama, among others, have repealed criminal defamation (or similar crimes) in cases of expressions about public officials.

information.³ In spite of the fact that impunity continues to be a serious problem, there have been important advances in that area.⁴ During these years it has also become possible to see new aspects of the issue of freedom of expression in the region, such as forms of indirect censorship (the discriminatory placement of government advertising, the concentration of ownership of media, among others) and self-censorship. Further, the inter-American system for the protection of human rights has become more accessible and effective: the last decade has seen the exponential growth of the number of individual cases handled by the IACHR and judgments handed down by the Inter-American Court of Human Rights on the issue of freedom of expression. In addition, a significant number of national courts have incorporated international standards on right to freedom of expression into their decisions.⁵

These advances have arisen from the consolidation or deepening of our democracies and from the vigorous, active and central participation of civil society in the defense and promotion of the right to freedom of expression throughout the region. But these advances are also a result of the advocacy of the inter-American system for the protection of human rights with respect to the right of freedom of expression during the last decade.

The role of the IACHR and the Inter-American Court has been fundamental to reinforce the right to freedom of expression in the inter-American legal order. The case law of the system has made clear that all of the region's inhabitants have the right to think for themselves and to express their opinions or ideas by any means and without fear of being persecuted, sanctioned or stigmatized; to participate in public debate through the means that exist to promote and enrich it; to know about other opinions and views of the world and to discuss their own with those who hold different, or completely contrary positions; to access relevant information in detail in order to exercise the

³ In recent years, Brazil, Chile, Colombia, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, the Dominican Republic, Trinidad and Tobago and Uruguay, among others, have enacted laws on access to information.

⁴ On this point, see: IACHR, "Special Study on the Status of Investigations into the Murder of Journalists during the 1995–2005 Period for Reasons That May Be Related to Their Work in Journalism," OEA/Ser. L/V/II.131 Doc. 35, March 8, 2008, <http://www.cidh.org/relatoria/section/Asesinato%20de%20Periodistas%20INGLES.pdf>. See also the reports from the Impunity Project, available at <http://www.impunidad.com/>.

⁵ On this issue, please refer to the annual reports of the Office of the Special Rapporteur, which discuss important comparative case law on the domestic implementation of international standards; they are available at: <http://www.oas.org/en/iachr/expression/reports/annual.asp>. In particular, Chapter 5 of the *2009 Annual Report* describes some of the most important advances in terms of the domestic incorporation (both through legislative and judicial action) of inter-American standards on freedom of thought and expression in 2009.

political checks and balances that make possible a true, deliberative democracy. As explained below, it is reasonable to assert that the practical achievements in the effective enjoyment of freedom of expression throughout the region have been obtained, at least in part, as a consequence of the consolidation of the regional international law on the issue.

The task of the Office of the Special Rapporteur in this process of consolidating regional law has been to advocate the inter-American standards on the issue, promote their implementation within national systems, and strengthen the operating capacity of States and the civil society organizations charged with developing the exercise and scope of the right to freedom of expression. Nevertheless, there are still unresolved issues, as well as new and important challenges.

The section following this part provides a summary of the progress made, and describes briefly the main difficulties and challenges currently facing the right to freedom of expression in the region.

II. Goals Achieved: Content and Scope of the Right to Freedom of Expression in the Regional Case Law⁶

As previously mentioned, the advances in the effective enjoyment of the right to freedom of expression that have taken place in the Americas during the course of the last decade have triggered the very significant parallel development of the inter-American legal standards relative to this right. The following paragraphs provide a summary of the most important decisions on the international obligations of States with respect to the scope, content, areas of implementation, forms of exercise and limits to this fundamental right.

A quantitative look at the development of the case law of the IACHR and the Inter-American Court is illustrative in this respect. By 1998, the inter-American system had a short catalog of decisions that substantially addressed the issue of freedom of expression. The IACHR had referred to the topic in its

⁶ These inter-American standards explained here are laid out in much greater detail Chapter 3 of the 2008 and 2009 annual reports of the Office of the Special Rapporteur, available at: <http://www.cidh.org/Relatoria/docListCat.asp?catID=24&IID=1>. These can also be found in "Inter-American Legal Framework Regarding the Right to Freedom of Expression," which is updated until 2009, available at: <http://www.oas.org/en/iachr/expression/docs/publications/INTER-AMERICAN%20LEGAL%20FRAMEWORK%20OF%20THE%20RIGHT%20TO%20FREEDOM%20OF%20EXPRESSION%20FINAL%20PORTADA.pdf>. Other publications of the Office of the Special Rapporteur on inter-American standards on specific issues can be found at: <http://www.oas.org/en/iachr/expression/publications/>

country reports and had published a limited number of merits reports⁷ and one thematic report⁸ on issues relating to this right, while the Inter-American Court had issued two advisory opinions.⁹ These important decisions laid the foundation for the subsequent development of the case law of the inter-American system in the field, particularly Advisory Opinion OC-5/85 of the Inter-American Court on the compulsory membership of journalists in a professional association, and the IACHR *Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights*. Nevertheless, in spite of the efforts made, in 1998 there were large gaps in the regional international law of the Americas with regard to the fundamental aspects of freedom of expression. Fifteen years later, the legal landscape has changed. The Inter-American Court has issued, over the course of this decade, several landmark judgments¹⁰ that

⁷ Among them are the reports contained in: IACHR, Report No. 2/96. Case No. 10.325, *Steve Clark et al.*, Grenada. March 1, 1996; IACHR. Report No. 11/96. Case No. 11.230. *Francisco Martorell*, Chile, 3 May 1996; IACHR, Report No. 29/96, Case No. 11.303, *Carlos Ranferí Gómez López*, Guatemala, 16 October 1996; IACHR, Report No. 38/97, Case No. 10.548, *Hugo Bustíos Saavedra*, Peru, 16 October 1997.

⁸ IACHR, *1994 Annual Report*, chap. 5: "Report on the Compatibility of 'Desacato' Laws with the American Convention on Human Rights," OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995, adopted during the 88th regular session.

⁹ These are: I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5; I/A Court H.R., Enforceability of the Right to Reply or Correction (Arts. 14.1, 1.1 and 2 American Convention on Human Rights), Advisory Opinion OC-7/86 of August 29, 1986, Series A No. 7.

¹⁰ I/A Court H.R., *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.)*, Judgment of February 5, 2001, Series C No. 73; I/A Court H.R., *Case of Ivcher Bronstein*, Judgment of February 6, 2001, Series C No. 74; I/A Court H.R., *Case of Herrera Ulloa*, Judgment of July 2, 2004, Series C No. 107. I/A Court H.R., *Case of Ricardo Canese*, Judgment of August 31, 2004, Series C No. 111; I/A Court H.R., *Case of Palamara Iribarne*, Judgment of November 22, 2005, Series C No. 135; I/A Court H.R., *Case of Claude Reyes et al.*, Judgment of September 19, 2006, Series C No. 151; I/A Court H.R., *Case of Kimel v. Argentina*, Merits, Reparations and Costs, Judgment of May 2, 2008, Series C No. 177; I/A Court H.R., *Case of Tristán Donoso v. Panama*, Preliminary Objection, Merits, Reparations and Costs, Judgment of January 27, 2009, Series C No. 193; I/A Court H. R., *Case of Ríos et al. v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Judgment of January 28, 2009, Series C No. 194; I/A Court H.R., *Case of Perozo et al. v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Judgment of January 28, 2009, Series C No. 195; I/A Court H.R., *Case of Usón Ramírez v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Judgment of November 20, 2009, Series C No. 207; I/A Court H.R., *Case of Manuel Cepeda-Vargas v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of May 26, 2010, Series C No. 213; I/A Court H.R., *Case of Gomes-Lund et al (Guerrilha do Araguaia) v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 24, 2010, Series C No. 217;

made—each in its specific area—substantive advances in defining the scope of freedom of expression, while the IACHR, aside from the impetus given to the 17 cases decided by the Inter-American Court, adopted the Declaration of Principles on Freedom of Expression¹¹ and published important merits reports that have not only put the Americas in tune with the legal developments that have been taking place worldwide, but have in many cases spurred such developments.¹² In the remaining part of this section we present a brief summary of the most important decisions rendered on the issue.

I/A Court H.R., *Case of Fontevecchia and D'Amico v. Argentina*, Merits, Reparations, and Costs, Judgment of November 29, 2011, Series C No. 238; I/A Court H.R., *Case of Vélez Restrepo and Family v. Colombia*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of September 3, 2012, Series C No. 248; I/A Court H.R., *Case of Uzcátegui et al. v. Venezuela*, Preliminary Objection, Merits and Reparations, Judgment of September 3, 2012, Series C No. 249. There are other cases in which the Inter-American Court has rendered important decisions on the scope of the right to freedom of thought and expression, even though the main legal issues in such cases concerned the infringement of rights other than the right enshrined in Article 13 of the American Convention: I/A Court H.R., *Case of López Álvarez*, Judgment of February 1, 2006, Series C No. 141; I/A Court H.R., *Case of Myrna Mack Chang*, Judgment of November 25, 2003, Series C No. 101; I/A Court H.R., *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Judgment of August 5, 2008, Series C No. 182; I/A Court H.R., *Case of González Medina and Relatives v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of February 27, 2012, Series C No. 182.

¹¹ The Declaration of Principles on Freedom of Expression was adopted by the IACHR in October of 2000 during its 108th regular session.

¹² The Office of the Special Rapporteur has also issued a series of thematic reports approved by the IACHR on diverse aspects of the right to freedom of expression and the right of access to information. These include, for example: *The Inter-American Legal Framework Regarding the Right to Access to Information* (2009), available at: <http://www.oas.org/en/iachr/expression/docs/publications/ACCESS%20TO%20INFORMATION%20FINAL%20CON%20PORTADA.pdf>; *The Right to Access to Information in the Americas: Inter-American Standards and Comparison of Legal Frameworks* (2012), available at: <http://www.oas.org/en/iachr/expression/docs/publications/access%20to%20information%20in%20the%20Americas%202012%2005%2015.pdf>; *The Inter-American Legal Framework Regarding the Right to Access to Information*, 2nd ed. (2012), available at: <http://www.oas.org/en/iachr/expression/docs/publications/2012%2009%2027%20ACCESS%20TO%20INFORMATION%202012%20edits.pdf>; *Principles on the Regulation of Government Advertising and Freedom of Expression* (2011), available at: <http://www.oas.org/en/iachr/expression/docs/publications/ADVERTISING%20PRINCIPLES%202012%2005%2007%20reduce.pdf>; *2002 Annual Report*, chapter 4: "Freedom of Expression and Poverty," available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=309&IID=1>; *A Hemispheric Agenda for the Defense of Freedom of Expression* (2009), available at: <http://www.oas.org/en/iachr/expression/docs/publications/INTER-AMERICAN%20LEGAL%20FRAMEWORK%20OF%20THE%20RIGHT%20TO%20FREEDOM%20OF%20EXPRES->

The legal framework provided by the inter-American system for the protection of human rights has been established among the various regional systems as the one most favorable to the rights of the individual. Article 13 of the American Convention on Human Rights places an extremely high value on freedom of expression.¹³ The same is true of the American Declaration on the Rights and Duties of Man (Article IV)¹⁴ and the Inter-American Democratic Charter (Article 4).¹⁵

SION%20FINAL%20PORTADA.pdf; *Inter-American Legal Framework regarding the Right to Freedom of Expression* (2009), available at: <http://www.oas.org/en/iachr/expression/docs/publications/INTER-AMERICAN%20LEGAL%20FRAMEWORK%20OF%20THE%20RIGHT%20TO%20FREEDOM%20OF%20EXPRESSION%20FINAL%20PORTADA.pdf>; *Freedom of Expression Standards for Free and Inclusive Broadcasting* (2009), available at: <http://www.oas.org/en/iachr/expression/docs/publications/Broadcasting%20and%20freedom%20of%20expresion%20FINAL%20PORTADA.pdf>; *Reparations for the Violation of the Right to Freedom of Expression in the Inter-American System* (2012), available at: <http://www.oas.org/en/iachr/expression/docs/publications/REPARATIONS%20abril%2018.pdf>. Other publications of the Office of the Special Rapporteur on inter-American standards on specific issues can be found at <http://www.oas.org/en/iachr/expression/publications/>.

¹³ This article states: “American Convention on Human Rights. Article 13: “Freedom of Thought and Expression. 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice. // 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: (a) respect for the rights or reputations of others; or (b) the protection of national security, public order, or public health or morals. // 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions. // 4. Public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence. // 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.”

¹⁴ “Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever” (American Declaration on the Rights and Duties of Man, Article 4).

¹⁵ “Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy. // The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy” (Inter-American Democratic Charter, Article 4).

The following part of this article discusses some of the most important decisions on the issue.

A. Doctrine and Case Law on the Scope and Content of the Right to Freedom of Expression

The case law of the inter-American system has characterized freedom of expression as a right with two dimensions: an individual aspect, consisting of the right of each person to express his own thoughts, ideas and information, and a collective or social aspect, consisting of society's right to obtain and receive any information (*information and ideas of any kind*), to know the thoughts, ideas and information of others, and to be well-informed.¹⁶ Bearing in mind its dual nature, it has been explained that freedom of expression is a *means for the exchange* of information and ideas between people and for mass communication among individuals.¹⁷ It has been held that for the average citizen, knowledge of the opinions or information held by others is just as important as his right to impart his own beliefs or information.¹⁸ It has also been emphasized that a specific act of expression involves both dimensions simultaneously, and that a limitation to the right to freedom of expression therefore affects at the same time both the right of the person who wishes to impart information or ideas and the right of members of society to know such

¹⁶ Cf. *Case of Kimel v. Argentina*, supra note 10, para. 53; *Case of Claude Reyes et al.*, supra note 10, para. 76; *Case of López Álvarez*, supra note 10, para. 163; *Case of Herrera Ulloa*, supra note 10, paras. 109–111; *Case of Ivcher Bronstein*, supra note 10, para. 146; *Case of Ricardo Canese*, supra note 10, paras. 77–80; *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.)*, supra note 10, paras. 64–67; Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), supra note 9, pp. 30–33. See also: IACHR, 1994 *Annual Report*, chap. 5; IACHR, Report No. 130/99, Case No. 11.740, *Víctor Manuel Oropeza*, Mexico, November 19, 1999; IACHR, Report No. 50/99, Case No. 11.739, *Héctor Félix Miranda*, Mexico, April 13, 1999; IACHR, Report No. 11/96, Case No. 11.230, *Francisco Martorell*, Chile, May 3, 1996.

¹⁷ Cf. *Case of Herrera Ulloa*, supra note 10, para. 110; *Case of Ivcher Bronstein*, supra note 10, para. 148; *Case of Ricardo Canese*, supra note 10, para. 79; *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.)*, supra note 10, para. 66; Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), supra note 10, para. 32. See also: IACHR, 1994 *Annual Report*, chap. 5.

¹⁸ Cf. *Case of Ivcher Bronstein*, supra note 9, para. 148; *Case of Ricardo Canese*, supra note 10, para. 79; *Case of "The Last Temptation of Christ" (Olmedo Bustos y otros)*, supra note 10, para. 66; Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), supra note 10, para. 32.

information or ideas.¹⁹ In addition, the right to information and to receive the greatest quantity of diverse information and opinions requires that a special effort be made to provide access to public debate under equal conditions and without any type of discrimination. This assumes special conditions of inclusion to allow all sectors of society to exercise this right effectively.

In their case law the IACHR and the Inter-American Court have underscored that the importance of freedom of expression within the catalog of human rights is derived also from its structural relationship to democracy.²⁰ Indeed, the full exercise of the right to express one's own ideas and opinions and to circulate available information, and the ability to deliberate openly and without inhibitions on matters that concern all of us, is an indispensable condition for the consolidation, functioning and preservation of democratic systems. Along these lines, the case law has emphasized that the democratic function of freedom of expression makes it a necessary condition for preventing authoritarian systems from taking root, and for facilitating personal and collective self-determination.²¹ In this respect, if the exercise of the right to freedom of expression favors not only the personal fulfillment of the individual who expresses an opinion but also the consolidation of truly democratic societies, the State has the obligation to create the conditions so that public debate satisfies both the legitimate needs of all people as consumers of specific information (entertainment, for example) and also as citizens. That is, there have to be sufficient conditions for public, plural and open deliberation to be able to occur with respect to the issues that concern all of us as citizens of a given State.²²

The case law of the IACHR and the Inter-American Court has recognized that the scope of protection of freedom of expression is nearly as broad as the possibilities for communications among people. The case law

¹⁹ Ibid. See also: IACHR, Report No. 11/96, Case No. 11.230, *Francisco Martorell*, May 3, 1996; IACHR, Report on the Merits No. 90/05, Case No. 12.142, *Alejandra Matus Acuña*, Chile, October 24, 2005.

²⁰ Cf. I/A Court H.R., *Case of Claude Reyes et al.*, supra note 10, para. 85; *Case of Herrera Ulloa*, supra note 10, paras. 112–13; *Case of Ricardo Canese*, supra note 10, paras. 82–82; *Case of Ivcher Bronstein*, supra note 10, para. 152; *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.)*, supra note 10, para. 69; *Case of Tristán Donoso v. Panama*, supra note 10, para. 113; *Case of Ríos et al. v. Venezuela*, supra note 10, para. 105; *Case of Perozo et al. v. Venezuela*, supra note 10, para. 116; *Case of Usón Ramírez v. Venezuela*, supra note 10, para. 47; Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), supra note 10, para. 70.

²¹ Cf. *Case of Herrera Ulloa*, supra note 10, para. 116; *Case of Ricardo Canese*, supra note 10, para. 86; *Case of Ríos et al. v. Venezuela*, supra note 10, para. 105; *Case of Perozo et al. v. Venezuela*, supra note 10, para. 116. See also: IACHR, Report No. 130/99, Case No. 11.740, *Case of Víctor Manuel Oropeza*, November 19, 1999.

²² IACHR, 1994 *Annual Report*, chap. 5.

has explained that, consequently, this freedom covers a wide range of expression, in terms of both form and content. Thus, with regard to the form of protected expressions, it has been held that in principle all forms of expression are covered by Article IV of the American Declaration and Article 13 of the American Convention. Nevertheless, some specific modes of expression have received the explicit attention of the instruments and bodies of the inter-American system for the protection of human rights.

The general presumption of coverage is explained by the primary obligation of neutrality of the State with regard to content, and consequently, by the need to guarantee that, in principle, no individuals, groups, ideas or means of expression are excluded a priori from public debate. The general presumption of coverage protects not only the dissemination of ideas and information that are received favorably or considered inoffensive or indifferent but also those that are offensive, shocking, unsettling, unpleasant or disturbing to the State or to any sector of the population, as this is required by the principles of pluralism and tolerance inherent in a democracy.²³ Nevertheless, certain speech is not protected by freedom of expression, by virtue of having been expressly prohibited in international treaties. There are international instruments that reflect the desire of States to prohibit explicitly certain speech content that is not just the expression of ideas or dissemination of information, but rather has the real and effective capacity to provoke violence, under the terms of Article 13(5) of the Convention. To date, the only speech that falls into that category is speech that incites violence, including war propaganda, the direct and public incitement of genocide,²⁴ and child pornography.²⁵

B. Speech Especially Protected by the Right to Freedom of Expression

Within the broad range of speech effectively guaranteed by freedom of expression, there are certain types of speech that, according to the IACHR and the Inter-American Court, enjoy a special level of protection because of their criti-

²³ Cf. *Case of Herrera Ulloa*, supra note 10, para. 113; *Case of Ivcher Bronstein*, supra note 10, para. 152; I/A Court H.R., *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.)*, supra note 10, para. 69; *Case of Ríos et al. v. Venezuela*, supra note 10, para. 105; *Case of Perozo et al. v. Venezuela*, supra note 10, para. 116. See also: IACHR, 1994 *Annual Report*, chap. 5.

²⁴ Article III-c of the Convention on the Prevention and Punishment of the Crime of Genocide.

²⁵ Convention on the Rights of the Child, Article 34-c; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; ILO Convention No. 182 on the worst forms of child labor, Article 3-b; American Convention on Human Rights, Article 19.

cal importance to the functioning of democracy or for the exercise of other fundamental rights. This includes political speech and speech concerning matters of public interest,²⁶ speech concerning public officials or candidates for public office,²⁷ and speech that constitutes a basic element of the personal identity or dignity of the individual²⁸ (such as religious speech). The presumption of coverage is even stronger with these types of speech, and the requirements that must be met in order to justify their restriction are particularly strict.

On this point, Principle 11 of the Declaration of Principles states: “11. Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as ‘*desacato* (insult) laws,’ restrict freedom of expression and the right to information.”

In the view of the IACHR, taking the idea of a democratic and activist citizenry seriously thus entails designing institutions that enable, rather than inhibit or make difficult, the deliberation of all issues and phenomena of public relevance. On this point, the very institutions of punitive law, and especially criminal law, are of particular relevance. The use of the corrective means of the State to impose a single view of the world or to discourage the open and vigorous deliberation of all matters of public relevance is incompatible with the guiding principles of democratic regimes and, in particular, with the right to freedom of expression enshrined in Article 13 of the American Convention. Some issues of particular concern include: (i) the existence of *desacato* and criminal defamation laws, particularly when they are used to criminally prosecute those who have made critical assessments of matters of public interest or of persons who have public relevance; (ii) the use of criminal laws to protect the “honor” or “reputation” of ideas or institutions; (iii) the attempts to apply criminal offenses such as “terrorism” or “treason” to those who have limited themselves to expressing or imparting ideas or opinions that are different—or even *radically* different—from those held by government authorities; and (iv) *the criminalization* of social protest. The following paragraphs provide a brief explanation of the reasons for which these phenomena hold particular relevance, and the way in which they must be addressed.

One of the first and most important IACHR reports on the subject of freedom of expression was the *Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights*.²⁹ Six of the seventeen decisions of the Inter-American Court addressing freedom of expression have

²⁶ Cf. *Case of Herrera Ulloa*, supra note 10, para. 127; *Case of Ivcher Bronstein*, supra note 10, para. 155. *Case of Tristán Donoso v. Panama*, supra note 10, para. 121; *Case of Usón Ramírez v. Venezuela*, supra note 10, para. 86. See: IACHR, 1994 *Annual Report*, chap. 5.

²⁷ Cf. *Case of Palamara Iribarne*, supra note 10, para. 82.

²⁸ Cf. *Case of López Álvarez*, supra note 10, para. 171.

²⁹ IACHR, 1994 *Annual Report*, chap. 5.

examined the criminal prosecution of persons who have expressed opinions critical of government officials or candidates for public office. In these decisions, the Inter-American Court held that the measures imposed were disproportionate and found that the critical expressions of opinion concerning public officials or candidates for public office, even if they were offensive or shocking, were protected by Article 13 of the American Convention.³⁰ In all of their reports on the issue, the IACHR and the Office of the Special Rapporteur have emphasized the need to *decriminalize* the exercise of this freedom and to establish criteria of proportionality for the establishment of any subsequent liability that could arise from its abusive exercise, in accordance with Principles 10 and 11 of the Declaration of Principles.

C. Criteria for Determining the Lawfulness of a Limitation of the Right to Freedom of Expression

The IACHR and the Inter-American Court have developed a clear line in their case law as to the requirements that must be met in the case of government limitations to freedom of expression, regardless of the authority that issues them or the form that they take, and on certain types of restrictions that are not admissible. To summarize, the IACHR and the Inter-American Court have established three requirements for a specific limitation to freedom of expression to be compatible with Article IV of the American Declaration and Article 13 of the American Convention: (a) it must be defined clearly and precisely in a law, with

³⁰ These are the Judgments rendered in the following cases: *Case of Herrera Ulloa*, supra note 10, *Case of Ricardo Canese*, supra note 10, *Case of Palamara Iribarne*, supra note 10, *Case of Kimel*, supra note 10. In this sense, the Inter-American Court has indicated that although the use of criminal law is not completely incompatible with the Convention, “[t]his possibility should be carefully analyzed, pondering the extreme seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception. At all stages the burden of proof must fall on the party who brings the criminal proceedings” (*Case of Kimel*, supra note 10, para. 78). The European Court of Human Rights issued a similar opinion in an important case on the issue in question. In that case it held: “Although sentencing is in principle a matter for the national courts, the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists’ freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence... In this connection, the Court notes the recent legislative initiatives by the Romanian authorities, leading to the removal of the offence of insult from the Criminal Code and the abolition of prison sentences for defamation” (ECHR, *Case of Cumpana and Mazare v. Romania* [Application No. 33348/96] of December 17, 2004, para. 115).

regard to both substance and procedure,³¹ (b) it must pursue objectives authorized by the Convention,³² and (c) it must be necessary in a democratic society to serve the compelling objectives pursued,³³ strictly proportionate to the objective pursued,³⁴ and must be appropriate to accomplish such objectives.³⁵ Further, it has been established that certain types of limitations are contrary to the American Convention. Thus, the limitations imposed must not amount to censorship,³⁶ and therefore must be established through the subsequent imposition of liability for the abusive exercise of the right.³⁷ Furthermore, they cannot be discriminatory or have discriminatory effects,³⁸ they cannot be imposed through indirect mechanisms of restriction,³⁹ and they must be exceptional.⁴⁰

³¹ Cf. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights) supra note 9, para. 59; *Case of Kimel*, supra note 10, para. 63; *Case of Claude Reyes et al.*, supra note 10, para. 89; *Case of Herrera Ulloa*, supra note 10, para. 121. *Case of Tristán Donoso v. Panama*, supra note 10, para. 116; *Case of Usón Ramírez v. Venezuela*, supra note 10, para. 49. See also: IACHR, 1994 *Annual Report*, chap. 5; IACHR. Report No. 11/96. Case No. 11.230, *Francisco Martorell*, May 3, 1996.

³² Cf. *Case of Palamara Iribarne*, supra note 10, para. 85; *Case of Herrera Ulloa*, supra note 10, paras. 121–23; *Case of Tristán Donoso v. Panama*, supra note 10, para. 116; *Case of Usón Ramírez v. Venezuela*, supra note 10, para. 49; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights) supra note 8, para. 43.

³³ Cf. *Case of Herrera Ulloa*, supra note 10, paras. 121–23; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights), supra note 9, para. 46; *Case of Kimel*, supra note 10, para. 83; *Case of Palamara Iribarne*, supra note 10, para. 85; *Case of Tristán Donoso v. Panama*, supra note 10, para. 116; *Case of Usón Ramírez v. Venezuela*, supra note 10, para. 49.

³⁴ *Ibid.* See also, IACHR, 1994 *Annual Report*, chap. 5.

³⁵ Cf. *Case of Kimel*, supra note 10, para. 83; *Case of Tristán Donoso v. Panama*, supra note 9, para. 116; *Case of Usón Ramírez v. Venezuela*, supra note 10, para. 49.

³⁶ Cf. *Case of Kimel*, supra note 10, para. 54; *Case of Palamara Iribarne*, supra note 10, para. 79; *Case of Herrera Ulloa*, supra note 10, para. 120; *Case of Tristán Donoso v. Panama*, supra note 10, para. 110. See also: IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Ricardo Canese v. Paraguay*, reprinted in the Judgment of August 31, 2004, Series C No. 111.

³⁷ Cf. *Case of Kimel*, supra note 10, para. 54; *Case of Palamara Iribarne*, supra note 10, para. 79; *Case of Tristán Donoso v. Panama*, supra note 10, para. 110; *Case of Usón Ramírez v. Venezuela*, supra note 10, para. 48. See also, IACHR, Report No. 11/96, Case No. 11.230, *Francisco Martorell*, May 3, 1996; IACHR, 1994 *Annual Report*, chap. 5.

³⁸ Cf. *Case of López Álvarez*, supra note 10, para. 170; *Case of Ríos*, supra note 10, para. 349; *Case of Perozo*, supra note 10, para. 380.

³⁹ American Convention on Human Rights, Article 13.3. Cf. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights), supra note 9, para. 47.

⁴⁰ Cf. *Case of Kimel*, supra note 10, para. 54.

The IACHR has maintained that the State incurs responsibility not only by placing arbitrary limitations on the right to freedom of expression but also by failing to remove unlawful barriers to the free and nondiscriminatory exercise of this right. In this respect, Principle 12 of the Declaration of Principles provides that

[m]onopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information. In no case should such laws apply exclusively to the media. The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals.

Finally, the Inter-American Court has determined that the State's liability for indirect restrictions on freedom of expression may also result from actions of private parties when it fails to guarantee the exercise of the right, taking into account the foreseeability of a real or immediate risk, as long as the actions effectively restrict (even in an indirect fashion) the communication of ideas and opinions.⁴¹

D. Right of Access to Information

The IACHR and the Inter-American Court have ascribed particular importance to the right to access to information as a vital component of the freedom of expression protected by Article 13 of the American Convention. This Article encompasses the specific right of individuals to access such information, as well as information about themselves or their assets, contained in private databases. At the same time, it imposes the positive obligation upon the State to provide its citizens access to information.⁴²

From the perspective of international human rights law, the Judgment of the Inter-American Court in the case of *Claude Reyes et al. v. Chile*⁴³ is the

⁴¹ Case of Ríos, *supra* note 10, para. 340; Case of Perozo, *supra* note 10, paras. 367.

⁴² Cf. *Case of Claude Reyes et al.*, *supra* note 10, para. 87; I/A Court H.R., *Case of Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 24, 2010, Series C No. 22, para. 197. See also, IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Claude Reyes et al. v. Chile*, reprinted in the Judgment of September 19, 2006, Series C No. 151, para. 87; Declaration of Principles on Freedom of Expression of the IACHR, Principles 2, 3 and 4.

⁴³ *Case of Claude Reyes et al.*, *supra* note 10.

most important decision on the subject, and has been strengthened in subsequent case law.⁴⁴ Likewise, the General Assembly of the OAS has spoken on multiple occasions to the importance of this right, and it has entrusted the Office of the Special Rapporteur with the preparation of studies and conferences on the issue.⁴⁵ Likewise, the Inter-American Juridical Committee adopted in its 73rd Regular Session a resolution on the right to access to information, which recognizes the inter-American standards on the subject and advances some important issues.⁴⁶ Similarly, the Model Law on Access to Public Information and its guide for implementation built on previous efforts to advance the right to access information and incorporated the principles outlined by the Inter-American Court in *Claude Reyes*, as well as the Principles

⁴⁴ See *Case of Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 24, 2010, Series C No. 22.

⁴⁵ On the subject of access to information, the General Assembly has issued several pronouncements supporting the work of the Office of the Special Rapporteur and urging the adoption of its recommendations. In its Resolution 1932 (XXXIII-O/03) of 2003, reiterated in 2004 in Resolution 2057 (XXXIV-O/04), and in 2005 in Resolution 2121 (XXXV-O/05), the General Assembly asked that the Office of the Special Rapporteur to continue to prepare a report within its annual reports on the situation of access to public information in the region. In 2006, through Resolution 2252 (XXVI-O/06), it entrusted the Office of the Special Rapporteur to support the member states who request its assistance in the drafting of laws and mechanisms on access to information. Likewise, the IACHR was asked to conduct a study on the different forms of guaranteeing all persons the freedom to seek, receive and impart public information based on the principle of freedom of expression. In 2007, the General Assembly adopted Resolution 2288 (XXXVII-O/07), which underscores the importance of the right to access to public information, takes note of the reports of the Office of the Special Rapporteur on the situation of access to information in the region, urges states to adapt their laws and entrusts the Office of the Special Rapporteur with providing advice on the issue. It also asks different organizations within the OAS, including the Office of the Special Rapporteur, to prepare a basic document on best practices and the development of common approaches or guidelines for increasing access to public information. This document was adopted in April of 2008 by the Committee on Juridical and Political Affairs. Furthermore, in 2008 the General Assembly in the Resolution 2418 (XXXVIII-O/08), ordered the Department of International Law to draft, with the collaboration of the Inter-American Juridical Committee, the Special Rapporteur for Freedom of Expression, the Department of Modernization of the State and Governance and the member states and civil society, a Model Law on Access to Public Information and a guide for its implementation, according to the international standards on the issue.

⁴⁶ Inter-American Juridical Committee, Principles on the Right to Access to Information, CJI/Res. 147 – LXXIII-O/08, August 7, 2008, available at: http://www.oas.org/cji/eng/CJI-RES_147_LXXIII-O-08_eng.pdf.

on Access to Information.⁴⁷ Finally, the Office of the Special Rapporteur, in its annual and thematic reports, has underscored the importance of the issue and the international obligations of States with regard to it.⁴⁸

According to the case of *Claude Reyes et al. v. Chile*, every person, without the need to prove a special interest, has the human right to access to information administered or produced by the State, or which should be administered or produced by the State. In this sense, the State has the international obligation to provide the public with information voluntarily and continuously, and to establish agile and efficient mechanisms for accessing the information requested.⁴⁹ Given that it is one of the protected forms of the right to freedom of expression, any restrictions to the right to access must respect the same criteria that are used to evaluate any other restriction to this right. Consequently, it is subject to a strict and exceptional system of limitations, which must be established previously and restrictively by law, pursue compelling objectives, be strictly necessary and proportionate with respect to the aims pursued, and be subject to the possibility of judicial review.

⁴⁷ Model Law on Access to Information, AG/RES 2607 (XL-O/10), available at http://www.oas.org/dil/access_to_information_model_law.htm. See also IACHR, *2010 Annual Report*, Report of the Office of the Special Rapporteur for Freedom of Expression, OEA/Ser.L/V/II Doc. 5, March 4, 2011, chap. 1, para. 14, available at: http://www.cidh.oas.org/annualrep/2010eng/RELATORIA_2010_ENG.pdf.

⁴⁸ See, for example, Chapter 4 for the 2009 Annual Report of the Office of the Special Rapporteur for Freedom of Expression, Chapters 3 and 4 of the 2010 Annual Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter III of the 2011 Annual Report of the Office of the Special Rapporteur for Freedom of Expression, and Chapter 4 of the 2012 Annual Report of the Office of the Special Rapporteur for Freedom of Expression. All available at: <http://www.oas.org/en/iachr/expression/reports/annual.asp>. Furthermore, see the thematic reports of the Special Rapporteur for Freedom of Expression on the right of access to information: *The Inter-American Legal Framework Regarding the Right to Access to Information* (2009), available at: <http://www.oas.org/en/iachr/expression/docs/publications/ACCESS%20TO%20INFORMATION%20FINAL%20CON%20PORTADA.pdf>; *The Right to Access to Information in the Americas: Inter-American Standards and Comparison of Legal Frameworks* (2012), available at: <http://www.oas.org/en/iachr/expression/docs/publications/access%20to%20information%20in%20the%20Americas%202012%2005%2015.pdf>; and *The Inter-American Legal Framework Regarding the Right to Access to Information. Second Edition*. (2012), available at: <http://www.oas.org/en/iachr/expression/docs/publications/2012%2009%2027%20ACCESS%20TO%20INFORMATION%202012%20edits.pdf>

⁴⁹ Cf. *Case of Claude Reyes et al.*, supra note 10, para. 77. See also, Arguments before the Inter-American Court of Human Rights in the *Case of Claude Reyes et al. v. Chile*, reprinted in the Judgment of September 19, 2006, Series C No. 151; Inter-American Juridical Committee, Principles on the Right to Access to Information (CJI/Res. 147 – LXXIII-0/08, August 7, 2008); 1999, 2004 and 2006 Joint Declarations of the UN, OAS and OSCE Special Rapporteurs for Freedom of Expression.

The case of *Gomes-Lund (Guerrilha do Araguaia) v. Brazil* reaffirmed and further strengthened the standard set in *Claude Reyes*, establishing that due to States' obligations to administer, produce, and provide information to the public, the decision to classify information as secret and deny its production may not depend exclusively upon a state organ if the commission of the illegal act in question has been attributed to its members, nor may such a state organ have final discretion over the existence of the requested documentation.⁵⁰ Finally, the Inter-American Court concluded that States may not resort to the lack of evidence of the existence of the documents requested by the victims or their family members, but rather it must justify its denial of documents by demonstrating it has taken all available measures to prove that the information does not exist. In this sense, government authorities must act in good faith and diligently carry out the actions necessary to ensure the effective protection of the right to freedom of expression, especially when the information request involves learning the truth regarding cases of serious human rights violations.⁵¹

The case law of the inter-American system has paid considerable attention to describing the different elements of the right to access to information, explaining that: (1) it is the right of every person; (2) in principle, it is not necessary to prove a personal interest or harm in order to obtain information held by the State, except where one of the exceptional restrictions permitted by the American Convention applies; (3) it enables people to access multiple types of information, including the information that the State keeps or manages, that it produces or is required to produce, that held by those who manage public services or public money, that the State collects or is required to collect, and personal information that is in private databases; (4) it is governed by the principles of *maximum disclosure* and *good faith*. According to the principle of maximum disclosure, all information is presumed public, except where there are exceptional restrictions provided by law; it implies the superiority of freedom of information in the case of a conflict of rules or lack of regulation and the consequent mandate for the restrictive interpretation of the exceptions regime. According to the principle of good faith, those obligated by the right to access to information should take the necessary steps to ensure that their actions guarantee the public interest and do not undermine individuals' confidence in the state's management; (5) it imposes various specific obligations upon the State, including the obligation to answer in a timely, complete and accessible manner the requests received; the obligation to provide an administrative procedure for accessing information with reasonable deadlines for making a reasoned decision or, if a restriction is applicable, provide judicial recourse to appeal the denial; the obligation to provide informa-

⁵⁰ See *Case of Gomes-Lund*, supra note 10, para. 202.

⁵¹ See *Case of Gomes-Lund*, supra note 10, para. 211.

tion to the public *motu proprio*; the obligation to bring its domestic legal system into line with the requirements of this right; the obligation to adequately implement the standards on this issue; the obligation to produce or record certain kinds of information; the obligation to clearly justify denials of information; the obligation to generate a culture of transparency and the obligation to disclose appropriate information to the public regarding the existence and mechanics of the legal instruments available to effectively enforce this right; (6) finally, given that the right to access to information is a component of the right to freedom of expression, it must be understood that it is subject to a strict and exceptional set of limitations that must be provided for by law, restrictively and in advance, must be strictly necessary and proportionate, and subject to the possibility of legal challenge in specific cases where access to information is sought.⁵²

E. Indirect Restrictions on Freedom of Expression

With regard to indirect restrictions, Inter-American jurisprudence has condemned such measures in a series of decisions.⁵³ The inter-American doctrine has addressed, inter alia, the forms of indirect censorship discussed below.

⁵² Cf. I/A Court H.R., *Case of Claude Reyes et al.*, supra note 10; *Case of Gomes-Lund*, supra note 43, paras. 197, 199–201. See also, Arguments before the Inter-American Court of Human Rights in the *Case of Claude Reyes et al. v. Chile*, reprinted in the Judgment of September 19, 2006, Series C No. 151, Inter-American Juridical Committee, Principles on the Right to Access to Information (CJI/Res. 147 – LXXIII-0/08, August 7, 2008); 1999, 2004 and 2006 Joint Declarations of the UN, OAS and OSCE Special Rapporteurs for Freedom of Expression. See also, Chapter 4 for the 2009 Annual Report of the Office of the Special Rapporteur for Freedom of Expression, Chapters 3 and 4 of the 2010 Annual Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter 3 of the 2011 Annual Report of the Office of the Special Rapporteur for Freedom of Expression, and Chapter 4 of the 2012 Annual Report of the Office of the Special Rapporteur for Freedom of Expression. All available at: <http://www.oas.org/en/iachr/expression/reports/annual.asp>. Furthermore, see the thematic reports of the Special Rapporteur for Freedom of Expression on the right of access to information: *The Inter-American Legal Framework Regarding the Right to Access to Information* (2009), available at: <http://www.oas.org/en/iachr/expression/docs/publications/ACCESS%20TO%20INFORMATION%20FINAL%20CON%20PORTADA.pdf>; *The Right to Access to Information in the Americas: Inter-American Standards and Comparison of Legal Frameworks* (2012), available at: <http://www.oas.org/en/iachr/expression/docs/publications/access%20to%20information%20in%20the%20Americas%202012%2005%2015.pdf>; and *The Inter-American Legal Framework Regarding the Right to Access to Information*, 2nd ed. (2012), available at: <http://www.oas.org/en/iachr/expression/docs/publications/2012%2009%2027%20ACCESS%20TO%20INFORMATION%202012%20edits.pdf>.

⁵³ Cf. *Case of Herrera Ulloa*, supra note 10; *Case of Kimel*, supra note 10, para. 117.

First, the IACHR has referred to the arbitrary allocation of public resources such as government advertising, frequencies or subsidies. Indeed, as the Office of the Special Rapporteur has already indicated,⁵⁴ one form of indirect censorship is the use of state authority over public resource allocation (like subsidies, government advertising, and radio and television frequencies and licenses) to reward media that are complacent before the authorities and to punish those media that are independent or critical. Some public officials believe that the advertising that the State must buy in order to meet its obligations (for example, to announce an invitation for bids or a vaccination campaign) must also serve the purpose of ensuring the loyalty of the media. It is true that, to paraphrase the well-known words of a former president, leaders do not pay to be beaten up; but neither do they pay to be applauded. They pay in order to meet their legal obligations, regardless of the informative or editorial content of the medium they must hire for such purposes.⁵⁵ Thus, for example, in the case of a vaccination campaign directed at mothers belonging to marginalized social sectors, the State must use the communications media that reach those sectors most effectively, without taking into account the editorial content of the medium. The decision must be made, then, bearing in mind the objective and legitimate purpose that must be accomplished by the

⁵⁴ IACHR, *2003 Annual Report*, vol. 3: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. See also, Office of the Special Rapporteur for Freedom of Expression, *Principles on the Regulation of Government Advertising and Freedom of Expression*, March 7, 2011, available at: <http://www.oas.org/en/iachr/expression/docs/publications/ADVERTISING%20PRINCIPLES%202012%2005%2007%20reduce.pdf>.

⁵⁵ On the different types and functions of so-called government advertising, the Office of the Special Rapporteur stated: "There are two types of government publicity: unpaid and paid. 'Unpaid' publicity includes press releases, the texts of legislation or legislative body meetings, and information which carries government support but which may be paid for by a private party. There are often legal obligations for national media sources to release this publicity, as a condition of the media outlets' use of the state's available frequencies and airwaves. Such conditions are usually included in states' fundamental broadcasting and press laws. 'Paid' publicity includes paid advertising in the press, on radio and on television, government-produced or sponsored software and video material, leaflet campaigns, material placed on the internet, exhibitions, and more. Governments use paid publicity to inform the public about important issues (i.e., ads pertaining to health and safety concerns), to influence the social behavior of individuals and business (such as encouraging voter turnout in an upcoming election), and to generate revenue through various programs (oftentimes through state-owned industry). The use of the media to transmit information is an important and useful tool for states, and provides much-needed advertising profits for media outlets" (IACHR, *2003 Annual Report*, vol. 3: Annual Report of the Office of the Special Rapporteur for Freedom of Expression, chap. 5, para. 3).

publication of the information and not the medium's affinity to the government which, at any time, has the power to ascribe to it.⁵⁶

According to IACHR doctrine, to attain a nondiscriminatory or arbitrary allocation of public resources, there have to be legal frameworks that require States to subject themselves to specific laws that prevent discretion in the exercise of this important function. In this respect, the Office of the Special Rapporteur has already indicated that “[i]nsufficiently precise laws and unacceptable discretionary powers constitute freedom of expression violations. It is indeed when laws pertaining to allocation of official publicity are unclear or leave decisions to the discretion of public officials that there exists a legal framework contrary to freedom of expression.”⁵⁷

The second form of indirect censorship that the inter-American doctrine has addressed concerns the arbitrary use of the mechanisms of regulation and oversight—for example, it has condemned the obligatory membership in a professional organization as a necessary requirement to practice journalism,⁵⁸ as well as the arbitrary use of State regulatory power when used to take actions designed to intimidate a media outlet as a result of the editorial slant of its programs.⁵⁹ Likewise, the Court has held that the disproportionate or discriminatory requirement of “accreditations or authorizations for the written media to participate in official events” would constitute an indirect restriction.⁶⁰

⁵⁶ On this point, the IACHR 2003 *Annual Report* states: “For such determinations to be in keeping with freedom of expression principles, they must be based on criteria ‘substantially related’ to the prescribed viewpoint-neutral purpose. For example, if a state’s goal was to promote sales of monthly passes on its city-wide public transportation system, it could legally choose to advertise only in newspapers largely distributed within that city. Newspapers from other regions that may have a very small distribution within that city would not be unfairly discriminated against by the government’s choice not to advertise with them. The [criterion] of being a paper with a majority of your distribution within the city is substantially related to the program’s viewpoint-neutral purpose of promoting use of its public transportation system, and thus, non-discriminatory” (IACHR, 2003 *Annual Report*, vol. 3: Annual Report of the Office of the Special Rapporteur for Freedom of Expression, chap. 5, para. 11).

⁵⁷ IACHR, 2003 *Annual Report*, vol. 3: Annual Report of the Office of the Special Rapporteur for Freedom of Expression, chap. 5, para. 23. See also, Office of the Special Rapporteur for Freedom of Expression, *Principles on the Regulation of Government Advertising and Freedom of Expression*. March 7, 2011, available at: <http://www.oas.org/en/iachr/expression/docs/publications/ADVERTISING%20PRINCIPLES%202012%2005%2007%20reduce.pdf>.

⁵⁸ I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985, Series A No. 5, para. 76.

⁵⁹ I/A Court H.R., *Case of Ivcher-Bronstein v. Peru*, Merits, Reparations and Costs, Judgment of February 6, 2001, Series C No. 74., paras. 158–63.

⁶⁰ *Case of Ríos*, supra note 10, para. 346; and *Case of Perozo*, supra note 10, para. 375.

The third form of indirect censorship referred to in the inter-American doctrine is the creation of an environment of intimidation that inhibits dissident speech. Indeed, means of indirect restriction involves statements by public officials that, in context, can constitute “forms of direct or indirect interference or harmful pressure on the rights of those who seek to contribute to public deliberation through the expression and diffusion of their thoughts.”⁶¹ Likewise, the case law has emphasized the special *status* and the rights and duties of journalists under the American Convention,⁶² highlighting in particular their right to receive protection from the authorities,⁶³ and the guarantee of their security, independence and autonomy as conditions for free expression in democratic societies.

Finally, the IACHR has addressed the explicit or tacit authorization of barriers imposed against individuals to impede the free flow of ideas, in particular, those that are bothersome or inconvenient to economic and political power.

F. The Right to Freedom of Expression of Public Servants

The Inter-American Court has stressed the particular connotations that the right to freedom of expression acquires when it is exercised by government officials, including members of the Armed Forces, and the duties that such exercise entails for those persons expressing their opinions.⁶⁴ Inter-American case law has established that, in the case of public officials, the exercise of this fundamental freedom acquires specific features, particularly in the areas of (a) the special duties they acquire by virtue of their status as state officials; (b) the duty of confidentiality that may apply to certain types of information held by the State; (c) the right and duty of public officials to denounce human rights violations; and (d) the particular situation of members of the Armed

⁶¹ I/A Court H. R., *Case of Ríos*, supra note 10, para. 139; and *Case of Perozo*, supra note 10, para. 151.

⁶² Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), supra note 9, para. 71, 72, and 74; *Case of Ivcher Bronstein*, supra note 10, para. 85; *Case of Herrera Ulloa*, supra note 10, paras. 117–19.

⁶³ IACHR, Report No. 50/99, Case No. 11.739, *Héctor Félix Miranda*, Mexico, April 13, 1999; IACHR, Report No. 130/99, Case No. 11.740, *Víctor Manuel Oropeza*, Mexico, November 19, 1999; IACHR, Report No. 38/97, Case No. 10.548, *Hugo Bustíos Saavedra*, Peru, October 16, 1997.

⁶⁴ Cf. *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*, supra note 10, para. 131. See also: IACHR, Report No. 20/99, Case No. 11.317, *Rodolfo Robles Espinoza e Hijos*, Peru, February 23, 1999.

Forces.⁶⁵ As far as the impact that statements of public officials have on the rights of others, the Inter-American Court has indicated that under certain circumstances, even when official comments do not expressly authorize, instigate, order, instruct, or promote acts of violence against individual citizens, their repetition and content can increase the “relative vulnerability” of these groups and the risk they face.⁶⁶

In sum, the decisions of the IACHR and the Inter-American Court have provided an extremely useful legal frame of reference for the inhabitants of the Americas to exercise their freedom of expression with a significant degree of legal certainty with regard to the content protected by the right and the conditions required for any possible limitation to it. Notwithstanding the above, there are still multiple problems in the implementation of the existing standards and new areas or problems that necessitate the progressive development of this legal framework. The following section addresses those issues.

G. The Duty to Protect Journalists, Prevent the Commission of Crimes against Them, and Combat Impunity for Crimes Committed as a Result of the Exercise of Freedom of Expression

The Inter-American Court has observed that journalism can only be exercised freely when those who carry out this work are not victims of threats or physical, mental or moral attacks or other acts of harassment.⁶⁷ Such actions infringe, in a particularly radical way, not only the victim’s individual freedom of thought and expression, but also the collective dimension of this right. Acts of violence against a journalist or media worker for reasons connected to that person’s professional activity violate both the individual’s right to express and impart ideas, opinions and information, as well as the rights of citizens and societies as a whole to seek and receive information and ideas of any nature.⁶⁸ As the regional case law and the most important studies on the issue have

⁶⁵ These issues are extensively developed in the 2008 and 2009 annual reports of the Office of the Special Rapporteur, available at: <http://www.cidh.org/Relatoria/docListCat.asp?catID=24&IID=1>.

⁶⁶ *Case of Ríos*, supra note 10, para. 145; *Case of Perozo*, supra note 10, para. 157.

⁶⁷ I/A Court H.R., *Case of Vélez Restrepo and Family v. Colombia*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of September 3, 2012, Series C No. 248, para. 209.

⁶⁸ IACHR Office of the Special Rapporteur for Freedom of Expression, “Special Study on the Status of Investigations into the Murder of Journalists during the 1995–2005 Period for Reasons That May Be Related to Their Work in Journalism,” OEA/Ser.L/V/II.131. Doc. 35, March 8, 2008, para. 67. Original: Spanish. Available at: <http://www.cidh.org/relatoria/section/Asesinato%20de%20Periodistas%20INGLES.pdf>.

maintained consistently, the murder, kidnapping, torture or disappearance of journalists is the most radical, violent and effective form of censorship.⁶⁹

The region has an alarming, lingering history of impunity with regard to crimes committed against journalists and other members of the media. This matter is not limited to the previously mentioned historical legacy. In some countries, the murders and serious attacks against journalists continue to be particularly troublesome, and have grown worse in recent years. Indeed, there is sufficient evidence of serious threats against freedom of expression from extremely violent organized crime groups that not only intimidate the population but even have the ability to terrorize and infiltrate the authorities themselves. In the same sense, in those places where there is exacerbated social tension, groups of civilians from all extremes have attacked and murdered journalists from media that do not share their point of view.⁷⁰

It is true that the aforementioned problems do not affect the majority of the countries in the region. However, due to the seriousness of their effects and because of the potential of these types of practices to spread rapidly, the above-cited are some of the most serious problems relevant to freedom of expression on the continent.

⁶⁹ In this respect, important organizations engaged in the defense of the right to freedom of expression have been able to verify in practice what is easy to know by intuition in theory: that the death of a journalist sends the clear message to the entire community that there are topics that result very dangerous to discuss, and that the best way to save one's life is to stop investigating and remain silent. What has been demonstrated is that this message is certainly very effective and creates an environment of widespread silence and self-censorship that is very difficult to prevent and counteract. Further, it is clear that the treatment of these crimes with impunity provides the criminals with an incentive to continue committing them. Thirteen international organizations that deal with freedom of the press and freedom of expression formed an International Mission that traveled to Mexico during 2008 to learn about and analyze the situation of journalists and the media in the country. After conducting important empirical research, the resulting document from the Mission indicates that: "[m]any of the journalists the Mission met with affirmed that the climate in Mexico is one of terror. Armed attacks and explosions at the facilities of local media, as well as the killings and disappearances of colleagues have had a profound impact on reporters. Most of the interviewees said that they felt unprotected and abandoned by both the authorities and the media, and that they used self-censorship as the only form of self-protection." The reference to fear and self-censorship is one of the central themes of the document. ARTICLE 19, *Libertad de Prensa en Mexico: La sombra de la impunidad y la violencia*, August 2008, Available at: <http://www.article19.org/pdfs/publications/mexico-la-sombra-de-la-impunidad-y-la-violencia.pdf> (in Spanish). See also: *Crímenes contra Periodistas*, Proyecto Impunidad, at <http://www.impunidad.com>; and *Global Campaign against Impunity*, at <http://www.cpj.org/campaigns/impunity/>.

⁷⁰ On these topics, see Chapter 2 of the 2008, 2009, 2010, 2011, and 2012 annual reports available at <http://www.oas.org/en/iachr/expression/reports/annual.asp>.

The Inter-American Court has made it clear that States incur responsibility not only by action—when one of their agents violates the rights protected in the American Convention—but also by omission, when it fails to promote, seriously and vigorously, all of the actions necessary to prevent the commission of crimes or to prevent the violations committed from remaining in impunity.⁷¹ With regard to violence against journalists, the Office of the Special Rapporteur has stressed the importance of three positive obligations that stem from the rights to life, humane treatment and freedom of expression. These are: the obligation to prevent, the obligation to protect, and the obligation to investigate, prosecute and punish perpetrators. These obligations are mutually reinforcing: a free, robust and uninhibited democratic debate requires that violence against journalists be confronted with a comprehensive policy of prevention, protection and prosecution.⁷²

According to inter-American doctrine, States have an obligation to take measures to prevent violence against journalists and media workers in countries where there is a risk of these occurring and in specific situations where the authorities know or should have known of the existence of real and immediate risk of such crimes.⁷³ The obligation to prevent includes the obligations to criminally prohibit violence against journalists, to maintain accurate statistics on violence against journalists,⁷⁴ to adopt a public discourse that contributes to the prevention of violence against journalists,⁷⁵ and to instruct

⁷¹ Cf. I/A Court H.R., *Case of Velásquez Rodríguez*, Judgment of July 29, 1988, Series C No. 4, para. 172.

⁷² IACHR Office of the Special Rapporteur for Freedom of Expression, *2010 Special Report on Freedom of Expression in Mexico*, OEA/Ser.L/V/II CIDH/RELE/INF.8/12, March 7, 2011, para. 17, available at: http://www.oas.org/en/iachr/expression/docs/reports/countries/2010%20FINAL%20CIDH%20Relator%C3%ADa%20Informe%20Mexico%20Libex_eng.pdf; IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II Doc. 66, December 31, 2011, para. 472, available at: <http://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf>.

⁷³ I/A Court H.R., *Case of Vélez Restrepo and Family v. Colombia*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of September 3, 2012, Series C No. 248, para. 194.

⁷⁴ IACHR Office of the Special Rapporteur for Freedom of Expression, *2010 Special Report on Freedom of Expression in Mexico*, OEA/Ser.L/V/II CIDH/RELE/INF.8/12, March 7, 2011, para. 297, available at: http://www.oas.org/en/iachr/expression/docs/reports/countries/2010%20FINAL%20CIDH%20Relator%C3%ADa%20Informe%20Mexico%20Libex_eng.pdf.

⁷⁵ I/A Court H.R., *Case of Perozo et al. v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of January 28, 2009, Series C No. 195, para. 151; IACHR Office of the Special Rapporteur for Freedom of Expression, *2010 Special Report on Freedom of Expression in Mexico*, OEA/Ser.L/V/II CIDH/RELE/INF.8/12, March 7, 2011, para. 189, available at: http://www.oas.org/en/iachr/expression/docs/reports/countries/2010%20FINAL%20CIDH%20Relator%C3%ADa%20Informe%20Mexico%20Libex_eng.pdf.

security services on respect for the media.⁷⁶ Further, the Inter-American Court has established that, where freedom of expression may be illegitimately restricted by de facto conditions that put those who exercise it in a great situation of risk or vulnerability, States must abstain from causing, stimulating, favoring, or deepening this vulnerability and must take necessary and reasonable measures to prevent violations and protect the rights of those who are found in such a situation.⁷⁷

Both the IACHR and the Inter-American Court have stated that the authorities also have the duty to guarantee protection to journalists so they can exercise fully their right to freedom of expression, and so they can protect their rights and their families' rights to life, safety and personal integrity.⁷⁸ According to the Court, States "have the obligation to adopt special measures of prevention and protection for journalists subject to special risk."⁷⁹ This special risk should be evaluated in light of the existing context in the country, and may result from factors such as the type of issues covered by journalists, the public interest nature of the information they cover, or the areas they must enter in order to do their work, as well the dissemination of such information or the decision to denounce or seek investigations of violations they suffered directly or came across in the course of their work.⁸⁰ In this sense, in specific case of journalist *Vélez Restrepo and Family v. Colombia*, the Court concluded that he "clearly faced real and immediate risk to his personal integrity" and that the State, despite being aware of this situation, failed to act diligently to adopt the necessary protection measures for Mr. Vélez Restrepo and his family in a timely manner.⁸¹

The Office of the Special Rapporteur has noted that in situations where violence against the media is particularly pervasive, States' obligation to protect at-risk journalists may require the creation of specialized protec-

⁷⁶ I/A Court H.R., *Case of Vélez Restrepo and Family v. Colombia*, Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 3, 2012, Series C No. 248, para. 277.

⁷⁷ See *Case of Cepeda-Vargas*, at para. 172.

⁷⁸ IACHR, Report No. 5/99, Case 11.739, *Héctor Félix Miranda*, Mexico, April 13, 1999; IACHR, Report No. 130/99, Case 11.740, *Víctor Manuel Oropeza*, Mexico, November 19, 1999.

⁷⁹ I/A Court H.R., *Case of Vélez Restrepo and Family v. Colombia*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of September 3, 2012, Series C No. 248, para. 194.

⁸⁰ I/A Court H.R., *Case of Vélez Restrepo and Family v. Colombia*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of September 3, 2012, Series C No. 248, paras. 193–94.

⁸¹ I/A Court H.R., *Case of Vélez Restrepo and Family v. Colombia*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of September 3, 2012, Series C No. 248, paras. 195, 197, 203.

tion programs, which should be properly implemented.⁸² Likewise, the Inter-American Court has determined that States should “continue taking all necessary measures to adopt and strengthen the special programs designed to protect journalists at risk.”⁸³

The third and final component of a comprehensive State policy to address violence against journalists is the punishment of those who perpetrate such violence. The Inter-American Court has indicated that impunity is understood as “the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of [human rights].”⁸⁴ Both the Commission and the Court have referred to the chilling effect of crimes against journalists on the willingness of other media professionals as well as ordinary citizens to denounce abuses of power and illicit acts of all kinds.⁸⁵ Such a chilling effect can only be avoided, the Commission has observed, “by swift action on the part of the State to punish all perpetrators, as is its duty under international and domestic law.”⁸⁶

⁸² IACHR, Office of the Special Rapporteur for Freedom of Expression, Official Joint Visit to Mexico, Preliminary Report, p. 6, <http://www.oas.org/es/cidh/expression/docs/informes/paises/2010%20Observaciones%20Preliminares%20sobre%20visita%20oficial%20a%20M%C3%A9xico%20282010%29.pdf>. See also IACHR, *Preliminary Observations of the Inter-American Commission on Human Rights on Its Visit to Honduras, May 15–18, 2010*, OEA/SER.L/V/II. Doc. 68, June 3, 2010, para. 26, available at: <http://www.cidh.org/countryrep/Honduras10eng/Honduras-10TOC.eng.htm>;

⁸³ I/A Court H.R., *Case of Vélez Restrepo and Family v. Colombia*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of September 3, 2012, Series C No. 248, para. 290.

⁸⁴ Cf. I/A Court H.R., *Case of the “White Van” (Paniagua Morales et al.)*, Judgment of March 8, 1998, Series C No. 37, para. 173.

⁸⁵ I/A Court H.R., *Case of Vélez Restrepo and Family v. Colombia*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of September 3, 2012, Series C No. 248, para. 148; IACHR, Report no. 136/10, Case 12.658, *Luis Gonzalo “Richard” Vélez Restrepo and Family (Colombia)*, October 23, 2010, para. 136, available at: <http://www.cidh.oas.org/demandas/12.658Eng.pdf>; Report No. 50/99, Case 11.739, *Héctor Félix Miranda (Mexico)*, April 13, 1999, para. 52; Report No. 130/99, Case No. 11.740, *Víctor Manuel Oropeza (Mexico)*, November 19, 1999, para. 58. See also IACHR Office of the Special Rapporteur for Freedom of Expression, *2010 Special Report on Freedom of Expression in Mexico*, OEA/Ser.L/V/II CIDH/RELE/INF.8/12, March 7, 2011, para. 192, available at: http://www.oas.org/en/iachr/expression/docs/reports/countries/2010%20FINAL%20CIDH%20Relator%C3%ADa%20Informe%20Mexico%20Libex_eng.pdf.

⁸⁶ IACHR, Report No. 136/10, Case 12.658, *Luis Gonzalo “Richard” Vélez Restrepo and Family (Colombia)*, October 23, 2010, para. 136, available at: <http://www.cidh.oas.org/demandas/12.658Eng.pdf>; Report No. 50/99, Case 11.739, *Héctor Félix Miranda (Mexico)*, April 13, 1999, para. 52; Report No. 130/99, Case No. 11.740, *Víctor Manuel Oropeza (Mexico)*, November 19, 1999, para. 58. See also IACHR Office of

In this sense, freedom of expression must be supported in practice by effective judicial guarantees that allow for the investigation, punishment and reparation of the abuses and crimes committed against journalists due to the practice of their profession.⁸⁷ Among others, States have the obligation to adopt an adequate institutional framework to permit the effective investigation, prosecution and punishment of violence against journalists, guaranteeing the independence of investigators, prosecutors and judges, and allocat-

the Special Rapporteur for Freedom of Expression, *2010 Special Report on Freedom of Expression in Mexico*, OEA/Ser.L/V/II CIDH/RELE/INF.8/12, March 7, 2011, para. 192, available at: http://www.oas.org/en/iachr/expression/docs/reports/countries/2010%20FINAL%20CIDH%20Relator%C3%ADa%20Informe%20Mexico%20Libex_eng.pdf. See also I/A Court H.R., *Case of Vélez Restrepo and Family v. Colombia*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of September 3, 2012, Series C No. 248, para. 212.

⁸⁷ One of the first cases on this subject was the case of journalist Hugo Bustíos Saavedra, murdered in 1988 by a Peruvian military patrol while investigating two homicides committed in the context of the internal conflict that was taking place in Peru at the time. In this case, the IACHR held that the State was responsible, *inter alia*, for the violation of Article 13 of the American Convention given that, knowing that there were journalists in the area of conflict, the State had omitted to grant them the necessary protection. Likewise, it found that the acts of violence that occurred had prevented the free exercise of the right to freedom of expression (i) of the murdered journalist, (ii) of the other media worker who was injured by the same patrol, (iii) of the community of media and journalists that were intimidated by this type violence, and (iv) of course, of society as a whole, which is deprived of knowledge of matters of great public importance relating to the armed conflict. According to the IACHR, journalists play a fundamental role in situations of armed conflict as they enable the public to receive independent information about what is happening, at great risk to themselves. As such, it held that the State must provide them with the greatest possible protection so they may continue to exercise their right to freedom of expression in such a way that society's right to be adequately informed is satisfied (Report No. 38/97, Case 10.548, *Hugo Bustíos Saavedra*, Peru, October 16, 1997, available at: <http://www.cidh.oas.org/annualrep/97eng/Peru10548.htm>). In later cases, such as the case of murdered journalist Héctor Félix Miranda in Mexico, the IACHR was clear in indicating that the only way to prevent the consequences arising from the death of a journalist and the State's omission in failing to investigate these acts fully, such as the creation of incentives to continue committing these crimes, is through the rapid action of the State in prosecuting and punishing the perpetrators. The IACHR maintained the same theory in the case of the murder of Víctor Manuel Oropeza. In that case, the IACHR did not find that the State was directly responsible for the journalist's death. Nevertheless, upon confirming that he had been the target of threats because of his publications, that there was no effort to protect him, and that the investigation of his death was deficient, the IACHR held that the victim's right to freedom of expression had been violated (IACHR, Report No. 5/99, Case 11.739, *Héctor Félix Miranda (Mexico)*, April 13, 1999, available at: <http://www.IACHR.org/annualrep/98eng/merits/mexico%2011739.htm>).

ing them the necessary resources,⁸⁸ exercise due diligence and exhaust lines of inquiry related to the victim's practice of journalism,⁸⁹ conduct investigations in a reasonable time,⁹⁰ facilitate victim participation,⁹¹ and not apply legal obstacles to the investigation and punishment of the most serious crimes against journalists.⁹²

H. Pluralism, Diversity and Freedom of Expression

Few ideas generate greater consensus in the region than the idea that freedom of expression is essential to the proper functioning of a democratic system. This issue has been addressed by the Heads of State and Government of

⁸⁸ See IACHR Office of the Special Rapporteur for Freedom of Expression, *2010 Special Report on Freedom of Expression in Mexico*, OEA/Ser.L/V/II CIDH/RELE/INF.8/12, March 7, 2011, paras. 210, 297, available at: http://www.oas.org/en/iachr/expression/docs/reports/countries/2010%20FINAL%20CIDH%20Relator%C3%ADa%20Informe%20Mexico%20Libex_eng.pdf.

⁸⁹ IACHR, Case 11.739. *Héctor Félix Miranda (Mexico)*, April 13, 1999, para. 52; Report No. 130/99, Case No. 11.740, *Víctor Manuel Oropeza (Mexico)*, November 19, 1999, para. 51; I/A Court H.R., *Case of Vélez Restrepo and Family v. Colombia*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of September 3, 2012, Series C No. 248, para. 211.

⁹⁰ IACHR, Report No. 136/10, Case 12.658, *Luis Gonzalo "Richard" Vélez Restrepo and Family (Colombia)*, October 23, 2010, para. 158, available at: <http://www.cidh.oas.org/demandas/12.658Eng.pdf>.

⁹¹ IACHR Office of the Special Rapporteur for Freedom of Expression, "Special Study on the Status of Investigations into the Murder of Journalists during the 1995–2005 Period for Reasons That May Be Related to Their Work in Journalism," OEA/Ser.L/V/II.131. Doc. 35, March 8, 2008, para. 41. Original: Spanish. Available at: <http://www.cidh.org/relatoria/section/Asesinato%20de%20Periodistas%20INGLES.pdf>.

⁹² For example, the IACHR has called particular attention to the use of amnesty legislation to impede investigations of violence against journalists. The Commission expressed "deep concern," for example, regarding the amnesty legislation adopted by the Parliament of Suriname on April 5, 2012, which seeks to "consolidate immunity for human rights violations committed during the military era (1982–1992)." In doing so, the IACHR made specific mention of the killings that took place in the military barracks of Fort Zeelandia on December 8, 1982, in which 15 prominent citizens died, among them five journalists (IACHR, Press Release 38/12, "IACHR Expresses Concern about Amnesty Legislation in Suriname," April 13, 2012, available at: http://www.oas.org/en/iachr/media_center/PReleases/2012/038.asp; IACHR, *2010 Annual Report*, OEA/SER.L/V/II. Doc. 5. March 7, 2011, vol. 2: Annual Report of the Office of the Special Rapporteur for Freedom of Expression, chap. 2, para. 404, available at: <http://www.oas.org/en/iachr/expression/docs/reports/annual/Informe%202010%20P%20ENG.pdf>).

the Americas,⁹³ the General Assembly of the OAS,⁹⁴ the IACHR, the Inter-American Court and the Office of the Special Rapporteur on multiple occasions.

The reasoning behind the above assertion is simple: democracy is based, among other things, on the existence of a free process for the selection of collective preferences that assumes an uninhibited, robust and wide-open public debate, to use the famous phrase of Justice Brennan of the US Supreme Court.⁹⁵ It is in this deliberative process where individuals can make informed decisions on the future of the society to which they belong. This is the reason for which censorship is prohibited: no one may exclude from public debate the circulation of the ideas and opinions of others. Each member of society has the power to decide which of these ideas or pieces of information are worthy of attention and which should be dismissed. This is precisely the democratic scope of freedom of expression: for all to have the opportunity to express themselves and to be heard, and that each one of us may know what others have to say.

If the above is true, then there is a component of freedom of expression to which we are indebted. The individual members of the social groups that have been traditionally marginalized, discriminated against, or that are in a situation of helplessness, are for various reasons systematically excluded from public debate. These groups do not have channels for the serious, robust and constant exercise of their right to express publicly their ideas and opinions or to be informed of the issues that affect them. This process of exclusion has also deprived society of knowledge of their interests, of the needs and proposals of those who have not had the opportunity to access democratic debate on an equal footing.

The Office of the Special Rapporteur has addressed this issue in reports approved by the IACHR, in which it has promoted the obligation of the

⁹³ Cf. Declaration of Santiago, Second Summit of the Americas, April 18–19, 1998, Santiago, Chile, in *Official Documents of the Summit Process from Miami to Santiago*, vol. 1, Office of Summit Follow-up, Organization of American States; Plan of Action, Second Summit of the Americas, April 18–19, 1998, Santiago, Chile, in *Official Documents of the Summit Process from Miami to Santiago*, vol. 1, Office of Summit Follow-up, Organization of American States; Plan of Action, Third Summit of the Americas, April 20–22, 2001, Québec, Canada, available at: <http://www.summit-americas.org>.

⁹⁴ For example, Resolutions 1932 (XXXIII-O/03), 2057 (XXXIV-O/04), 2121 (XXXV-O/05), 2149 (XXXV-O/05), 2237 (XXXVI-O/06), 2287 (XXXVII-O/07), 2288 (XXXVII-O/07), 2434 (XXXVIII-O/08), 2418 (XXXVIII-O/08), and 2523 (XXXIX-O/09) of the OAS General Assembly.

⁹⁵ “[D]ebate on public issues should be uninhibited, robust, and wide-open, and ... it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials” (*New York Times Co. v. Sullivan*, 376 US 254, 270–71 [1964]).

States not only to combat monopoly and oligopoly but also to take affirmative actions that enable traditionally excluded groups or sectors to access the public deliberation process.⁹⁶

In terms of combating monopolies, all of the bodies of the inter-American system for the protection of human rights have spoken out to recall the State's obligation to prevent public or private monopolies in the ownership or control of the media and thereby to guarantee the plurality of the media.⁹⁷ In this respect, Principle 12 of the Declaration of Principles on Freedom of Expression states that

⁹⁶ See, for example, Office of the Special Rapporteur for Freedom of Expression, *2002 Annual Report*, chap. 4: "Freedom of Expression and Poverty," available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=309&IID=1>; *A Hemispheric Agenda for the Defense of Freedom of Expression* (2009), available at: <http://www.oas.org/en/iachr/expression/docs/publications/INTER-AMERICAN%20LEGAL%20FRAMEWORK%20OF%20THE%20RIGHT%20TO%20FREEDOM%20OF%20EXPRESSION%20FINAL%20PORTADA.pdf>; *Inter-American Legal Framework regarding the Right to Freedom of Expression* (2009), available at: <http://www.oas.org/en/iachr/expression/docs/publications/INTER-AMERICAN%20LEGAL%20FRAMEWORK%20OF%20THE%20RIGHT%20TO%20FREEDOM%20OF%20EXPRESSION%20FINAL%20PORTADA.pdf>; *Estándares de libertad de expresión para una radiodifusión libre e incluyente* (2009), available at: <http://www.oas.org/es/cidh/expresion/docs/publicaciones/Radiodifusion%20y%20libertad%20de%20expresion%20FINAL%20PORTADA.pdf>.

⁹⁷ The Inter-American Court addressed this point when it held that: "[i]t is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, *inter alia*, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists ... the right to impart information and ideas cannot be invoked to justify the establishment of private or public monopolies of the communications media designed to mold public opinion by giving expression to only one point of view. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights, *supra* note 9, para. 34). The IACHR has also spoken to this point, among others, in Principle 12 of the Declaration of Principles on Freedom of Expression. Likewise, the IACHR stated that: "one of the fundamental requirements of the right to freedom of expression is the need for a broad plurality of information. In today's society, mass media such as television, radio and the press have an undeniable power with regard to the education of all of its inhabitants on cultural, political, religious and other matters. If these media are controlled by a limited number of individuals, or by just one, a society is in fact being created in which a limited number of individuals, or by a single one, exercise control over information and—directly or indirectly—over the information that the rest of the people receive. This lack of plurality in information is a serious obstacle to the functioning of democracy. Democracy requires the confrontation of ideas; it requires debate and discussion. When this debate does not exist, or is weakened due to the

[m]onopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information. In no case should such laws apply exclusively to the media. The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals.

It is necessary, among other things, for States to recognize and facilitate access under equal conditions, for the commercial, social and public uses of radio or television, not only the electromagnetic spectrum, but also the new digital dividend. It is indispensable to remove all disproportionate or discriminatory restrictions that prevent radio and television operators of all kinds to fully accomplish the commercial, social or public mission they undertake. It is fundamental that the allocation of frequencies processes be open, public and transparent, and that they be submitted to clear, preestablished rules and requirements that are strictly necessary, fair and equitable. It is necessary for this process to guarantee that disproportionate or unequal barriers to access to the media are not imposed, and that the arbitrary or discriminatory allocation, withdrawal, or nonrenewal of frequencies or licenses is prevented. It is essential that all allocation and regulatory procedures be guided by a technical body that is independent of the government, enjoys autonomy in the face of political pressures and changes, is subject to all the guarantees of due process, and is subject to judicial review.

Rules such as the above allow for the protection of commercial channels and radio stations from abusive influences and provide them with the security that they will not be subject to arbitrary decisions, whatever their orientation may be. These types of rules also encourage the existence of state or public television channels and radio stations that are independent of governments and vitally promote the circulation of ideas and information not usually included in commercial programming (because of low profitability), and not generally given air time on social or community channels or radio stations (because of high production costs or because of the topics covered). Finally, regulations such as the ones proposed would enable the recognition and promotion of social communications media such as community channels and radio stations, which play an essential role in the democracies of our

fact that the sources of information are limited, the main pillar of democratic functioning comes under attack" (IACHR, *2003 Annual Report*, vol. 3: Annual Report of the Office of the Special Rapporteur for Freedom of Expression, chap. 7: "The Situation of Freedom of Expression in Guatemala").

region.⁹⁸ These cases deal with a normative framework to promote the vitality of democracy if we bear in mind that the communicative process must satisfy not only the consumer needs of society's inhabitants (legitimate entertainment needs, for example) but also their information needs. If we are to take seriously the notion that we are all equal in dignity and rights, we can do no less than to give voice to those who have been voiceless.

⁹⁸ Specifically on the protection of community radio, the report on freedom of expression in Guatemala, adopted by the IACHR in 2003, stated: "The Commission and its Office of the Special Rapporteur maintain that community radio is positive because it promotes the culture and history of communities, provided that it is done within the legal framework. The Commission recalls that the issuance or renewal of broadcasting licenses must be subject to a clear, fair and objective procedure that takes into account the importance of the communications media in ensuring that all sectors of ... society participate in an informed manner in the democratic process. In particular, community radio is of major importance in the promotion of national culture, development and education among ... different communities... Therefore, auctions that consider only financial criteria or that grant concessions without providing equal opportunities for all sectors are incompatible with democracy and with the right to freedom of expression guaranteed in the American Convention on Human Rights and in the Declaration of Principles on Freedom of Expression" (IACHR, *2003 Annual Report*, vol. 3: Annual Report of the Office of the Special Rapporteur for Freedom of Expression, chap. 7: "The Situation of Freedom of Expression in Guatemala," para. 414.

The Right to Information in Latin America

TOBY MENDEL

I. Introduction

Countries in Latin America have been somewhat late in recognizing the right to information, or the right to access information held by public authorities (also referred to as freedom of information). With the exception of Colombia, which adopted a rather skeletal right to information law in 1985, no country in Latin America had adopted a law giving effect to this right prior to 2002. This may be contrasted with North America and Europe, where laws date back much earlier, and even Asia, where countries like Japan,¹ South Korea² and Thailand³ all adopted laws before 2000.

But Latin America has made great strides in recent years and has even provided important global leadership on this key democratic right. In 2006, the Inter-American Court of Human Rights became the first international court to recognize a general human right to information, founded on the right to freedom of expression.⁴ The 2002 Mexican right to information law, along with its implementation in practice, has been hailed as one of the most progressive in the world. And Article 6 of the Mexican Constitution is one of the most detailed and comprehensive constitutional guarantees of the right to information to be found anywhere.

¹ Law Concerning Access to Information Held by Administrative Organs, May 1999.

² Act on Disclosure of Information by Public Agencies, Act No. 5242, 31 December 1996.

³ Official Information Act, B.E. 2540 (1997).

⁴ *Claude Reyes and Others v. Chile*, 19 September 2006, Series C No. 151, http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc.

As of October 2014, 14 countries in Latin America had adopted right to information laws. These are, respectively, Brazil,⁵ Chile,⁶ Colombia,⁷ the Dominican Republic,⁸ Ecuador,⁹ El Salvador,¹⁰ Guatemala,¹¹ Honduras,¹² Mexico,¹³ Nicaragua,¹⁴ Panama,¹⁵ Paraguay¹⁶, Peru¹⁷ and Uruguay.¹⁸

This article describes the development of the right to information at the regional level within Latin America or, more precisely, by the organs of the Organization of American States (OAS). It then provides a general assessment of the 14 right to information laws in Latin America by reference to seven key attributes of such laws, namely the right of access, procedural guarantees, the duty to publish, exceptions, appeals, sanctions and protections and promotional measures.

II. International Standard Setting

The right to access information held by public authorities was not specifically included in the early human rights instruments, such as the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in

⁵ Law No. 12.527, published in the Official Diary of 18 November 2011.

⁶ Law No. 20.285 on Access to Public Information, published in the Official Gazette on 20 August 2008.

⁷ Law 57 of 1985 by which the Disclosure of Official Acts and Documents is Ordered, published in the Official Diary on 12 July 1985 as amended by Law 1712 of 2014 and Law 1437 of 2011.

⁸ General Law on Free Access to Public Information, Law No. 200-04, promulgated on 28 July 2004.

⁹ Organic Law on Transparency and Access to Public Information, Law 34 of 2004, published in the Official Gazette on 18 May 2004.

¹⁰ Law on Access to Public Information, Decree 534 of 2011, promulgated on 16 March 2011.

¹¹ Law of Access to Public Information, Judgment No. 57-2008 of the Congreso of the Republic of Guatemala, issued 23 September 2008.

¹² Transparency and Access to Public Information Law, Decree No. 170-2006, published in the Official Gazette on 30 December 2006.

¹³ Federal Transparency and Access to Public Government Information Law, June 2002.

¹⁴ Law No. 621 on Access to Public Information, adopted 22 June 2007.

¹⁵ Law Which Dictates Norms for Transparency in Public Administration, Establishes Habeas Data and Dictates Other Dispositions of 2002, Law No. 6, signed 22 January 2002, published in Official Gazette No. 24,476 of 23 January 2002.

¹⁶ Law no. 5.282 on Free Citizens Access to Public Information and Government Transparency, 18 September 2014.

¹⁷ Law of Transparency and Access to Public Information, Law No. 27.806, adopted in August 2002.

¹⁸ Law No. 18.381 on the Right to Access Public Information, adopted 17 October 2008.

1948,¹⁹ the International Covenant on Civil and Political Rights (ICCPR), a legally binding treaty, adopted by the UN General Assembly in 1966,²⁰ or the American Convention on Human Rights (ACHR), adopted by the OAS in 1969.²¹ It was only much later, indeed quite recently, that it came to be seen as a human right. Standard setting by OAS organs has played an important role in the wider debate about recognition of the right to information as a human right.

The earliest statements by international officials on the right to information were in the context of the Joint Declarations which have been adopted annually by the special international mandates on freedom of expression. In November 1999, the (then) three special mandates—the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression—adopted their first Joint Declaration, which included the following statement: “Implicit in freedom of expression is the public’s right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people’s participation in government would remain fragmented.”²²

In their 2004 Joint Declaration, the special mandates elaborated further on the right to information, stating:

The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.²³

The statement went on to elaborate in some detail on the specific content of the right.

Finally, in the 2010 Joint Declaration, which highlights ten key challenges to freedom of expression over the next decade, the (now four, including the African Commission Special Rapporteur on Freedom of Expression and Access to Information) special mandates, recognizing challenges to the real-

¹⁹ UN General Assembly Resolution 217 A (III), 10 December 1948.

²⁰ UN General Assembly Resolution 2200 A (XXI), 16 December 1966, entered into force 23 March 1976.

²¹ Adopted at San José, Costa Rica, 22 November 1969, OAS Treaty Series No. 36, entered into force 18 July 1978.

²² 26 November 1999. Available at: <http://portal.unesco.org/ci/en/files/26152/12047264643UNFEX1999.pdf/UNFEX1999.pdf>.

²³ Adopted on 6 December 2004. All of the Joint Declarations are available at: http://www.oas.org/en/iachr/expression/basic_documents/declarations.asp.

ization of the right to information, stated: "Over the past ten years, the right to information has been widely recognized as a fundamental human right."²⁴

Within Latin America, as far back as 1994 the Inter-American Press Association, a regional NGO, organized the Hemisphere Conference on Free Speech, which adopted the Declaration of Chapultepec,²⁵ a set of principles which elaborate on the guarantee of freedom of expression found at Article 13 of the ACHR. The Declaration explicitly recognizes the right to information as a fundamental right, which includes the right to access information held by public authorities. The relevant passages read as follows:

2. Every person has the right to seek and receive information, express opinions and disseminate them freely. No one may restrict or deny these rights.
3. The authorities must be compelled by law to make available in a timely and reasonable manner the information generated by the public sector.

Although the Declaration of Chapultepec originally had no formal legal status, as Santiago Canton noted when he was OAS Special Rapporteur for Freedom of Expression, it "is receiving growing recognition among all social sectors of our hemisphere and is becoming a major point of reference in the area of freedom of expression."²⁶ To date, the heads of state or government of 29 countries in the Americas, as well as numerous other prominent persons, have signed the Declaration.²⁷

The OAS Special Rapporteur has frequently recognized the right to information as a fundamental right. In his 1999 Annual Report to the Inter-American Commission on Human Rights, the Special Rapporteur noted that the right to information was a cornerstone of democracy and that information held by public authorities, which was paid for with taxpayer's money, belonged to the people.²⁸

²⁴ Adopted on 3 February 2010.

²⁵ Adopted on 11 March 1994.

²⁶ *Annual Report of the Inter-American Commission on Human Rights 1998, Volume III, Report of the Office of the Special Rapporteur for Freedom of Expression*, 16 April 1999, OEA/Ser.L/V/II.102, Doc. 6 rev., chapter 3.

²⁷ The countries are Antigua and Barbuda, Argentina, the Bahamas, Bolivia, Belize, Brazil, Chile, Colombia, Costa Rica, Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, Uruguay, and the United States of America. Information available at: http://www.declaraciondechapultepec.org/english/presidential_sign.htm.

²⁸ *Annual Report*, p. 24.

In October 2000, in an important development, the Inter-American Commission on Human Rights approved the Inter-American Declaration of Principles on Freedom of Expression,²⁹ which is the most comprehensive official document to date on freedom of expression in the Inter-American system. The preamble reaffirms the aforementioned statements on the right to information and notes that the right to information promotes transparency and accountability on the part of the government. The Principles unequivocally recognize the right to information, with the relevant passages reading:

3. Every person has the right to access information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.
4. Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

The OAS General Assembly has followed up on the Principles by adopting resolutions on access to public information every year since 2003. These resolutions highlight Member States' obligation to "respect and uphold the principle of providing access to public information," which is deemed to be "an indispensable requirement for democracy."³⁰ Since 2010, these resolutions have also welcomed the Model Inter-American Law on Access to Public Information³¹ and called on states to take it into account when designing their legal frameworks for the right to information.

Legal recognition of the right to information by the Inter-American Court of Human Rights has its roots in a 1985 Advisory Opinion interpreting Article 13 of the ACHR. In that case, the Court, referred to the dual nature of the right to freedom of expression, as guaranteed by Article 13, which protects both the right to impart, as well as to seek and to receive, information and ideas, noting:

Article 13 ... establishes that those to whom the Convention applies not only have the right and freedom to express their own thoughts

²⁹ 108th Regular Session, 19 October 2000. Available at: <http://www.iachr.org/declaration.htm>.

³⁰ The most recent resolution is Resolution 2811 (XLIII-O/13) on Access to Public Information and Protection of Personal Data, adopted on 6 June 2013.

³¹ Available at: http://www.oas.org/dil/access_to_information_model_law.htm.

but also the right and freedom to seek, receive and impart information and ideas of all kinds... [Freedom of expression] requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.³²

The Court also stated: "For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinion," concluding that "a society that is not well-informed is not a society that is truly free."³³ Although the Court did not, at that time, recognize the right to access information held by public authorities, it did provide a solid jurisprudential basis for later recognition of the right.

In an extremely significant development, the Inter-American Court of Human Rights, in a decision rendered on 19 September 2006, specifically held that the general guarantee of freedom of expression at Article 13 of the ACHR protects the right to access information held by public authorities. Specifically, the Court stated:

77. In respect of the facts of the present case, the Court considers that article 13 of the Convention, in guaranteeing expressly the rights to "seek" and "receive" "information," protects the right of every person to request access to the information under the control of the State, with the exceptions recognised under the regime of restrictions in the Convention. Consequently, the said article encompasses the right of individuals to receive the said information and the positive obligation of the State to provide it, in such form that the person can have access in order to know the information or receive a motivated answer when for a reason recognised by the Convention, the State may limit the access to it in the particular case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied.³⁴

³² Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85, 13 November 1985, para. 30.

³³ *Ibid.*, paras. 32 and 70.

³⁴ *Claude Reyes and Others v. Chile*, 19 September 2006, Series C No. 151, para. 77 (Inter-American Court of Human Rights). Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc.

The quotation above highlights some key attributes of the right to information, namely that restrictions on the right of access may only be imposed consistently with Article 13 and that no reasons need to be provided to access information. The Court went on to elaborate in some detail on the legitimate scope of restrictions on the right to information, stating that they should be provided by law, aim to protect a legitimate interest recognized under the ACHR and be necessary in a democratic society to protect that interest.³⁵

The Court unanimously held that the respondent state, Chile, had breached the right to freedom of expression guaranteed by Article 13 of the ACHR. Significantly, the Court required Chile not only to provide the information to and compensate the victims, and to publish the judgment, all fairly routine types of remedies, but also to adopt the necessary measures through national legislation to give effect to the right to information, and even to provide training to public officials on this right.³⁶

Another significant regional development was the adoption, by the Inter-American Juridical Committee, in August 2008, of a very progressive set of Principles on the Right of Access to Information.³⁷ This document contains a statement of ten principles governing the right to information, including that it is a fundamental human right, that it should apply broadly to all information and to all public authorities, including the executive, judicial and legislative branches of government, that exceptions should be clearly and narrowly drawn and that there should be a right of appeal to an administrative body against denials of the right.

As a result of developments within the OAS system, but also more widely internationally,³⁸ it can now no longer be seriously doubted that the right to freedom of expression as guaranteed under international law, which includes the right to *seek* and *receive*, as well as to *impart*, information and ideas, encompasses a right to access information held by public authorities. These same developments have provided a detailed elaboration of the content of the right to information, about which there is significant international consensus.

³⁵ Ibid., paras. 88–92.

³⁶ Ibid., para. 174.

³⁷ Adopted at its 73rd Regular Session on 7 August 2008 in Rio de Janeiro, Brazil, OAS/Ser.Q, CJI/RES.147 (LXXIII-O/08).

³⁸ For a fuller elaboration of standard setting on the right to information, see Toby Mendel, *The Right to Information in Latin America: A Comparative Legal Survey* (Quito: UNESCO, 2009), <http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/the-right-to-information-in-latin-america-a-comparative-legal-survey/>, and Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, 2nd ed. (Paris: UNESCO, 2008), http://portal.unesco.org/ci/en/ev.php-URL_ID=26159&URL_DO=DO_TOPIC&URL_SECTION=201.html.

Breaking down the right to information into its key attributes inevitably involves judgment calls. For purposes of this article, as noted above, seven key attributes are identified, namely the right of access, procedural guarantees, the duty to publish, exceptions, appeals, sanctions and protections and promotional measures.

The *right of access*, for purposes of this article, encompasses the primary guarantees of the right, as well as support for these, for example in the form of statements of purposes or objectives. It also refers to the scope of the law, in terms of information and/or documents covered, public authorities covered by the obligation to be open and who may make a request for information.

Procedural guarantees covers the range of procedural rules for processing requests for information. This includes how to lodge requests, the provision of assistance to applicants, procedures for transferring requests and for consulting with third parties, timelines for responding to requests, the form in which information should be provided, the fees which applicants may be charged, including for providing them with information, and the notice that must be provided to applicants, for example when their requests are refused.

It is accepted that the right to request information should be supplemented by an obligation on all public authorities to disclose information proactively. The *duty to publish* refers to the scope of this obligation and related obligations, such as the means by which this information must be publicly disseminated.

The right to information is not absolute and every right to information law envisages limitations on the right to protect overriding public and private interests. The section on *exceptions* assesses both the systemic rules on exceptions—such as the relationship with secrecy laws, whether exceptions are based on the harm that is likely to result from disclosure, whether exceptions may be overridden or “trumped” in the public interest, and overall historical time limits on secrecy—as well as the specific exceptions found in different laws.

Better practice right to information laws include a system of complaints or appeals against refusals to provide access to information or other perceived failures to respect the rules. The nature of these oversight systems is covered in the section on *appeals*, including which types of appeals are available—internal, administrative and/or judicial—as well as how each type functions.

International standards on the right to information call for protections to be provided for good faith disclosures pursuant to the right to information law, as well as for sanctions for individuals who willfully obstruct implementation of the law. These are assessed in the section on *sanctions and protections*.

Finally, giving full effect to the right to information depends on a number of *promotional measures* being included in the law. The range of promotional measures included in different right to information laws from Latin America are assessed in this section.

III. The Right of Access

Establishing a right to access information held by public authorities is the fundamental reason for adopting a right to information law, and most laws in Latin America set out the right with reasonable clarity. In some cases, such as the laws of Mexico and Honduras, this is set out as a free standing right, subject to the regime of exceptions. In other cases, the right is cast in more procedural terms, providing that anyone may make a request for information and, subject to certain conditions—procedural and substantive—have access to the information. It is not clear whether this makes much difference in practice, although a rights-based approach may provide a stronger basis for legal appeals.

A particular feature in Latin America is that many countries include a set of rules on *habeas data* within their right to information laws. Typically, these provide for a right to access, correct and question the use of personal information held by public authorities. The Panamanian right to information law goes even further, establishing a right to participate and the principle that access to information should serve this right.

A. Purposes

Many Latin American right to information laws set out their overall purposes or functions and/or include principles governing access. These can be classified into two main categories. The first category is the external benefits that the right to information will help deliver. Including these in a law can be useful to clarify the underpinnings of that law and as an interpretive tool, providing guidance on how to resolve conflicts between openness and other interests. Principles in this category found in different laws in Latin America include promoting transparent, accountable and effective government, controlling corruption, fostering public participation, enhancing the ability of the public to scrutinize the exercise of public power, promoting a democratic and human rights culture and the rule of law, improving public record management, and building public understanding and an informed citizenry. The Honduran law contains perhaps the most comprehensive list from among Latin American laws of external “purposes.” The Mexican law refers to many of these objectives, and also calls for the law to be interpreted in accordance with international and constitutional standards and in a manner that best gives effect to the right to information.

Several Latin American laws also include a number of more pragmatic “instructions” among their principles, such as that public authorities should establish practical mechanisms to ensure access to information, and ensure that access is rapid, inexpensive and not unduly burdensome. A good example of this is Nicaragua, which has a long list of principles governing the applica-

tion of the law, including that it is a multi-ethnic State so information must be provided in different languages and that information must be provided to underpin participation.

B. Scope of Information Covered

Different laws take different approaches to defining their scope in terms of information covered. Some distinguish between information and documents or records, and better practice is to cover both. Most laws define information and/or records broadly to include all forms of recorded content, whether written, electronic or held in some other storage system. In Honduras, the law only applies to information created after its adoption, a very unfortunate limitation, which contradicts the idea of access as a human right.

A number of countries in Latin America, including Uruguay and Guatemala, employ the notion of “public information” when defining the scope of the right to information law, with the result that they exclude from the beginning information which is deemed to be confidential. This is a serious shortcoming since excluding information at the definitional stage, instead of through the regime of exceptions, means that various safeguards built into the latter, such as the requirement of harm to a legitimate interest and the public interest override, do not apply.

In most cases, the right applies to all information regardless of the purpose for which it is held. Some laws, however—such as those of Mexico, the Dominican Republic and Guatemala—apply only to information held for official purposes or in connection with the functions of the public authority. In the Dominican Republic, the law does not apply where another law regulates access. These restrictions unnecessarily limit the right to information. Access to information should not depend on the deemed purpose for which information is held. Furthermore, these restrictions require officials to make potentially very important threshold decisions in terms of access to information, which is an unwanted burden for them and could be an opportunity for abuse.

All Latin American right to information laws apply to information actually held by a public authority. One approach, quite developed in Latin America, is for laws to cover information that is “in the power of” a public authority, which is probably a broader notion than the idea of information being held. Other laws even extend to information that may be accessed by a public authority. The Ecuadorian law, for example, applies to information held by or on behalf of a public authority. The Peruvian law extends to information financed by the public budget, while the Panamanian law extends to information “in the knowledge” of a public authority.

C. Authorities Covered

Most Latin American laws define the types of public authorities covered by the law. One exception is Uruguay, which does not include any definition of public authorities at all, in what can only be described as a very serious shortcoming.

Most countries in Latin America include all three branches of government—executive, legislative and judicial—within the scope of the right to information law, making this an area where the region is generally progressive. Limiting the scope of the law to certain branches of government is contrary to the idea of access to information as a human right which should, as a result, apply to all public authorities.

Mexico and Chile have adopted a novel approach to the question of coverage, largely to take into account constitutional division of powers issues. In these countries, very detailed obligations apply to the executive branch of government, which also falls under the authority of the administrative oversight body, while the legislative and judicial branches have a more a generic obligation effectively to do their best to meet the same standards, while the law fails to elaborate detailed rules for how this should be done. If this proves to be successful, which remains to be seen, it could be a good model for other countries.

Another area of divergent practice is with respect to public corporations. In most countries in Latin America, the law does extend to public corporations, although this is not always the case. In Peru, all state-owned corporations are covered. In some countries, like Chile and Colombia, only corporations with 50% public ownership are covered. State control over a corporation—which is ensured by 50% ownership but is often present with a much lower levels of ownership—should engage openness obligations.

The scope of many Latin American laws extends beyond public corporations and includes private bodies that receive funding through public contracts. In Peru, coverage is even extended to bodies exercising public power or performing a public function.

D. Who May Request Information

In most countries in Latin America everyone, regardless of citizenship, can make requests for information. The Uruguayan law specifically prohibits discrimination on the basis of nationality. The Peruvian law provides that a request for information may not be denied based on the identity of the applicant, which presumably includes citizenship. In Mexico, requests may be made anonymously, so that citizenship is irrelevant. In contrast, in a few countries, like Honduras, it would appear that the right is restricted to citizens or residents. There are fairly obvious reasons for extending the right to

everyone, and it has not proved to be a significant additional cost or burden in those countries which have done this.

IV. Procedural Guarantees

A. Making Requests

The rules for processing requests for information is an area where, on balance, Latin American laws demonstrate a relatively high degree of consistency. Virtually all laws provide for requests to be made in writing, including electronically, and to include the name and contact details of the applicant, along with a sufficiently detailed description of the information sought to enable it to be identified. In some countries—such as Guatemala— applicants can also make requests orally. In Mexico, requests may be made anonymously, which clearly prevents problems with differential treatment of requests based on the identity of the applicant, something which has been a problem in some countries.

In most countries, no reasons need to be given for a request. An unfortunate exception is the Dominican Republic, where reasons may be required. Nicaragua requires applicants to provide detailed information when making a request, including information about their official identity card. This is not better practice and it is unclear why this is deemed to be necessary.

Many laws specify that requests must be submitted to particular officials, such as appointed information officers, while others simply provide that a request may be lodged with the public authority which holds the information. In Nicaragua, all requests must formally be registered, and applicants provided with a copy of the registration. This can help in tracking the processing of requests and provide clear grounds for appeals.

Better practice laws require assistance to be provided to applicants where they are having problems making requests. This approach is less prevalent in Latin American than in other regions, but some laws, for example that of Mexico, include more general obligations on public authorities to provide assistance.

B. Timelines

Many laws in Latin American provide for clear and short time limits for responses to requests for information and most also require the information to be provided as soon as possible, with the time limit set as a maximum.

In Honduras and Guatemala, responses must be provided within ten days, which may be extended for another ten days. In Ecuador, the limit is also

ten days but extendable by only five days. Peru has the shortest timelines, of seven days, which may be extended in certain circumstances by another five days. While commendable, this may also be unrealistically short. It is important that timelines be as short as is reasonable but not so short that public authorities will experience persistent difficulties in meeting them.

In many countries, a failure to respond within the time limits constitutes a deemed refusal of the request. In Peru, an unacceptably ambiguous response also constitutes a deemed refusal, prompting officials to be clear. In Mexico, breach of the time limits places an obligation on the public authority to provide the information, and for free, unless the oversight body gives permission for the information to be withheld. The same is true in Colombia, Guatemala and Uruguay. These are some of the more rigorous mechanisms to ensure timely provision of information found anywhere in the world.

C. Processing Requests

Most laws require public authorities to give written notice of their responses to requests. For requests which are being granted, the notice should include any fees and the form in which the request is to be granted, along with the right to appeal against these decisions. Where a request is refused, the notice should include the reasons for the refusal, preferably referring to a specific legal provision, along with information about the right to appeal against it.

In Nicaragua, a failure to provide reasons for a refusal renders that refusal void, presumably leading to a requirement to provide the information. Various countries have more specific rules. In Peru, a refusal notice must note the time for which the information is expected to remain confidential. In Mexico, an internal oversight committee must be informed if access is denied, or if the applicant is notified that the information is not held.

Many countries allow applicants to select from among a number of forms of access, such as inspection of the document, a transcript, an electronic copy, a photocopy or an official copy. In most countries, the form specified may be refused in certain cases, for example where this would harm the record, unreasonably divert the resources of the public authority or infringe copyright.

Various systems apply to fees. There are four main types of costs potentially involved in the provision of information, namely the cost of searching for the information, any costs associated with preparing or reviewing the information, including to assess whether an exception applies, the cost of reproducing or providing access to the information and the cost of sending the information to the applicant. Most countries in Latin America, including Mexico, Honduras, Panama and Peru, take a progressive approach here, restricting fees to the cost of reproducing the information; in Peru, charging other costs is considered to be an obstruction of access and can attract sanc-

tions. In Uruguay, only the cost of materials used for reproduction may be charged, while in Nicaragua, the cost of materials for reproduction and delivery of the information may be charged. The Colombian law includes language suggesting that smaller requests should be provided for free, in line with better international practice in this area. In Guatemala, fees may not exceed market rates and applicants may even be given the document to take away and copy for themselves so as to reduce costs.

On the other hand, very few Latin American laws follow better international practice by providing for a central body to establish a schedule of fees, although this is stipulated in the Mexican law. Such a rule avoids a patchwork of fee structures at different public authorities and tends to limit inflationary fee pressures. Few Latin American laws provide for fee waivers, for example for the poor or for public interest requests.

V. Duty to Publish

A. Scope of the Duty to Publish

All of the Latin American right to information laws impose a duty on public authorities to publish certain key information on a proactive or routine basis. Indeed, this is generally an area where the Latin American laws incorporate progressive rules. The law of Peru is among the most expansive in this regard anywhere in the world.

Most laws provide a list of the categories of documents that must be published by public authorities, such as information about their general operations, about the services they provide and about how to request information. Mexico provides a list of information which must be published, but also provides for oversight of the system by the independent oversight body, which can develop regulations effectively extending the list. This is a very useful approach, as it allows for more ambitious proactive publication rules to be developed organically, as public authorities develop capacity in this area.

Otherwise, the specific list of information subject to proactive disclosure varies considerably from country to country. One interesting example is Colombia, where public authorities must publish all information required to ensure that the public can exercise control over them. In the Dominican Republic and Panama, public authorities must publish a range of information necessary to foster public participation, while in Guatemala, information necessary to promote compliance with the goals and objectives of the law must be published. Panama has a special provision which requires public authorities to develop and disclose proactively codes of conduct governing their performance.

Several laws, including those of Ecuador and Peru, also include special lists of information subject to proactive publication for specific public authorities, such as the legislature, the central bank and so on. In Ecuador and in Guatemala, all funds spent by political parties must be published.

Many laws in Latin America place a particular emphasis on the proactive disclosure of information of a commercial or financial nature. The Peruvian law, noted above, includes a whole chapter on public financial information, which not only requires proactive publication of a very wide range of financial information but also calls for dissemination of the methodology used to collect the information, along with a definition of the terms used, to help users understand the information. A number of laws, including the laws of Chile, Peru and Panama, require such information as the salaries of staff and all public contracts and procurement to be made public.

B. Disseminating Information

Many laws—including those of Chile, Panama and Peru—provide for regular updating of information published proactively, often annually. In Peru, certain financial information needs to be published on a quarterly basis, while in Colombia, public authorities must publish gazettes containing certain categories of information on a monthly basis, and these must be disseminated for free to public offices, universities, the media, professional bodies and associations.

A number of laws address the issue of making information subject to proactive publication widely accessible. In Nicaragua, special efforts must be made to ensure access by indigenous peoples and communities of “African descent,” and systems must be developed regarding dissemination. In Panama and Peru, information must be made available on websites as well as in printed publications. The Peruvian law requires public authorities to use “appropriate” methods of dissemination, to allocate adequate funds for this task and to develop special rules for this, including in rural or low-population density areas.

VI. Exceptions

Most laws in Latin America and around the world include a comprehensive list of exceptions, or grounds for refusing to disclose information. At least one however, Paraguay, does not contain any list of exceptions, deferring instead to secrecy laws for this purpose.

A. Secrecy Laws and Rules

The relationship between right to information and secrecy laws is a difficult issue. In principle, it does not matter which law provides for an exception, as long as that exception is appropriate in scope, taking into account the status of the right to information as a human right. In practice, however, most secrecy laws fail to meet these standards in part because they were drafted before the right to information was recognized. Put differently, leaving in place the preexisting regime of secrecy at the time a right to information law is adopted is likely to perpetuate undue secrecy.

Despite this, right to information laws in most countries, including in Latin America, leave in place secrecy laws. In contrast, in Nicaragua the right to information law appears to prevail over secrecy laws, while in some countries—such as the Dominican Republic and Panama—the relationship between the right to information and secrecy laws remains unclear. Better practice—including in countries such as South Africa³⁹ and India⁴⁰—is for the right to information law to provide explicitly that it has overriding force in case of conflict with a secrecy law.

A related issue is the relevance of classification. In some countries, classification is irrelevant and the exceptions in the right to information law, or possibly in a secrecy law, serve as the basis for decisions about disclosure. This has obvious merit, since mere administrative classification should not be able to override legal provisions requiring disclosure.

A trend in Latin America is to allow classification to stand as a full reason not to disclose information, but to impose procedural and substantive limits on it, along with rules requiring openness in relation to documents that have not been classified. While it is preferable not to allow classification to serve as a ground to refuse to disclose information, it is also useful to place limits on, among other things because officials will often respect classification, regardless of its actual legal implications. A number of right to information laws in Latin America—including Chile, Ecuador and Uruguay—require public authorities to keep an up-to-date list or index of the documents they have classified. In Ecuador, this list is itself required to be a public document.

Under the Mexican law, classification is subject to different levels of review, including by the independent oversight body, which also sets standards for classification in the first place. In Guatemala and Nicaragua, classification requires agreement of the head of the authority and a document may not be classified after a request for access to it has been lodged. In Honduras, any decision to classify information must be made by the senior official at the

³⁹ Promotion of Access to Information Act, Act No. 2, 2000.

⁴⁰ Right to Information Act, 2005.

public authority which holds the information and must be sent to the oversight body, which may reject it.

B. Harm and Public Interest Tests

The three-part test for exceptions to the right to information under international law requires information to be disclosed unless the public authority can show (a) that the information falls within the scope of an exception listed in the law; (b) that disclosure would pose a risk of harm to the interest protected by the exception; and (c) that this harm outweighs the overall public interest in the disclosure of the information. Few of the right to information laws in Latin America strictly conform to all three parts of this test, but many do at least broadly reflect parts of it.

An overall majority of the exceptions in the various Latin American laws are subject to a harm test of one sort or another, or have built-in harm tests, although an unfortunate number of laws, including those of Ecuador and Panama, lack such a test, or have too many exceptions that are not subject to it.

The standard of harm required varies considerably both between laws and among exceptions within laws, and this may lead to very different results in terms of openness. A few examples of this standard from different laws are: “would be likely to prejudice,” “could lead to a negative result,” “adequate reason to believe harm would result” and “harm could reasonably be expected.”

Most of the right to information laws in Latin America do not include a general public interest override, although some, including Nicaragua and Guatemala, do. This is a serious shortcoming but at least a number of these laws have particular public interest overrides for certain exceptions. Mexico, Uruguay, Guatemala, and Peru, for example, provide for an override for information relating to human rights breaches or crimes against humanity. The Peruvian law also protects the right of certain bodies—including the Congress, the judiciary, the General Controller (Contralor), and the Human Rights Ombudsman (Defensor del Pueblo)—to access information, presumably on the theory that they will exercise public interest oversight.

C. Exclusions and Other Features

A number of laws completely exclude certain bodies or types of information from the ambit of the right to information law, which is a radical way of avoiding the harm test and public interest override, or any consideration at all of whether the information should be disclosed. Security and/or intelligence bodies, for example, are excluded in Peru, while information provided on a confidential basis by third parties is excluded in Guatemala. Similarly, some

countries, including Nicaragua, Ecuador and Guatemala, completely exclude personal information from the ambit of the law.

Another shortcoming of a number of laws in Latin America is that they do not explicitly provide for the partial release of information (severability) where only part of a document is confidential. Exceptions to this include Panama, Peru and Mexico, where severability is provided for. Such a rule makes obvious sense, since the fact that some information in a document is confidential should not, of itself, prevent disclosure of the rest of the information.

Many right to information laws in Latin American provide for historical disclosure. In Nicaragua, for example, information remains classified for up to ten years, which may be extended once for another five years. In Guatemala, classification lasts for seven years and may only be extended once, for a maximum of an additional five years. In Honduras, classification lasts for only ten years and may only be extended by court order. In Mexico, only the oversight body may extend the initial period of classification, which is 12 years.

VII. Appeals

Individuals should have the right to lodge complaints or appeals where they feel that their requests for information have not been dealt with properly, in particular because they have been refused access to the information they seek. This oversight clearly needs to be done by an independent body since otherwise decisions on whether or not to disclose information would ultimately remain at the discretion of public officials. Globally, a three-tier system of complaints is common, starting with an internal complaint, followed by the option of a complaint to an independent administrative oversight body, and finally an appeal before the courts.

A. Internal Appeals

Many Latin American right to information laws—including those of the Dominican Republic, Guatemala and Peru—provide for an internal appeal to a higher authority within the same authority that originally refused the request. The Guatemalan law includes detailed provisions on internal complaints, which go to the head of the public authority.

B. Independent Administrative Oversight

In Latin America, only four countries—Chile, El Salvador, Honduras and Mexico—provide for an independent administrative oversight body to review

refusals to provide access to information. This is unfortunate, as independent oversight bodies have proven central to the effective functioning of right to information regimes in other countries, among other things because appeals to the courts are too time-consuming and expensive for all but a small minority of applicants.

Given that, at least in their complaints role, oversight bodies have to mediate between the public and officials, it is important that they be protected against interference, particularly of a political nature. Different laws take different approaches to guaranteeing the independence of these bodies. The appointments process is clearly central to this guarantee. As a general rule, involving more sectors of society in the appointments process is an important way of enhancing the independence of the body. In Mexico, appointments are made by the executive branch but are subject to veto by the Senate or Permanent Commission. In Chile, the members of the Council for Transparency are proposed as a group by the President to the Senate, which must either accept or reject them, *en bloc*. In Honduras, the three commissioners of the Federal Institute for Access to Information and Data Protection are elected by a two-thirds vote of the National Congress from among ten candidates, with the Attorney General, the National Commissioner for Human Rights, the National Forum for Convergence, and the Superior Court of Accounts each proposing two candidates.

A number of other rules can enhance independence, including prerequisites for being appointed as a member (such as having expertise and having a strong social or moral record), conditions on membership (for example, preventing individuals with strong political connections from being appointed), protection of tenure (including through establishing limited grounds for removal), and funding mechanisms (including by linking salaries of members to preexisting civil service grades, such as those of the judicial service).

Better practice laws establish broad grounds for complaints covering all failures to apply the law. It is also important that the oversight body be able to investigate breaches of its own motion, so that failures to respect the law in relation to which complaints are unlikely to be lodged by individuals—such as a failure to respect proactive publication rules—may also be addressed. Not all oversight bodies in Latin America have such broad complaints' powers.

Oversight bodies should be given the necessary powers to conduct full investigations into information complaints, including to summon witnesses and, importantly, to request any information from public authorities, including information to which access has been refused. Powers to enforce decisions should also be provided for, which is sometimes achieved by registering decisions with the courts. This is an area where not all of the laws in Latin America are as progressive as they could be, although the Mexican law is more detailed than many as regards the powers of the oversight body.

C. Court Appeals

Most, but not all, right to information laws provide for an ultimate appeal to the courts. Significantly, in Mexico, only applicants, and not public authorities, may lodge a court appeal. This prevents public authorities from using their often considerable powers to go to court to delay or prevent information disclosure.

A particular feature of a number of laws in Latin America—including those of Uruguay, Colombia and Ecuador—is rules establishing expedited appeals to the courts, as a way of making them more accessible in the absence of an administrative appeal. The Uruguayan law also gives courts the power to resolve appeals on an urgent basis where necessary. Furthermore, public legal counsel is made available to appellants, helping to address the prohibitive cost normally associated with court appeals.

VIII. Sanctions and Protections

Most laws in Latin America, as well as globally, include a regime of sanctions for individuals who obstruct access to information and some also provide for the direct responsibility of public authorities which are failing to provide access to information. In some countries—like the Dominican Republic and Peru—it is a criminal offence willfully to obstruct access, and conviction may lead to criminal penalties, including imprisonment. In other countries—like Chile, Honduras and Mexico—the law provides instead for administrative liability.

Some laws define the scope of behavior that attracts a sanction broadly, to include destroying, damaging, altering, concealing or falsifying records, while others—including the laws of Ecuador and Nicaragua—define it more narrowly as including only cases involving denials of requests for information. Other laws, such as those of the Dominican Republic, Panama and Honduras, refer generically to any manner of obstruction of access.

Very few laws in Latin America provide for protection for good faith disclosures pursuant to the law, although this is not uncommon in other countries. Instead, most countries in the region—including Mexico, Honduras, Guatemala, Ecuador and Uruguay—actually provide for liability for disclosing confidential information. This inhibits the disclosure of information by failing to provide officials with the protection they need to have the confidence to make disclosure decisions and it is, as a result, likely to perpetuate a culture of secrecy. The Peruvian law does at least provide some protection for good faith disclosures, indicating that compliance with the law by providing information should not lead to “reprisals.” However, it also provides for sanctions for wrongful disclosures.

None of the right to information laws in Latin America provide for protection for whistleblowers. On the other hand, in some countries, such as

Chile, other laws provide for whistleblower protection. Protecting whistleblowers is an important information safety valve which can help ensure that key public interest information gets disclosed.

IX. Promotional Measures

The range of promotional measures provided for varies considerably from law to law. Some laws—such as those of Chile, Peru, and the Dominican Republic—contain very few such measures while other laws—such as those of Mexico, Honduras, and Nicaragua—contain more extensive measures.

Many laws provide for the appointment of dedicated officials—information officers—to assist in the implementation of the law. These officials undertake a range of functions, such as processing requests for information, ensuring that proactive publication takes place, providing assistance to applicants, proposing internal procedures to implement the law, promoting training, undertaking reporting and so on.

A number of laws provide for the production of a guide to explain access to information rights to the public and how to lodge requests, while in other countries these are produced as a matter of practice.

A particular feature of many Latin American laws is their strong commitment to public education on the right to information. The Nicaraguan law, for example, provides for both training of officials and the incorporation of the right to information into school curriculums at all levels. It even provides for the establishment of a national center for research and teaching on the right to information. Other countries that promote wide training and public education activities include Ecuador, Guatemala and Honduras.

Quite a few countries in Latin America provide for minimum standards for record management. Some countries—like Mexico—give a mandate to a central body—in that case the general oversight body—to set standards regarding record management, and establish a system for ensuring that public authorities respect these standards. This is a good approach as it can ensure strong, uniform standards across the civil service. In other countries, like Nicaragua, Panama and Guatemala, individual public authorities are obliged to improve their own record management systems.

Some countries provide for reporting on implementation of the law, although these obligations are less developed in Latin America than in other parts of the world. In some countries, such as Ecuador, individual public authorities are required to report on implementation, but there is no provision for a central report. In Guatemala, public authorities must report to the General Attorney for Human Rights, which may, in turn, report to parliament. In Panama, public authorities must include a section on access to information in their annual reports to parliament. In Mexico, the oversight body must

report annually to parliament on the right to information, while all public authorities must provide the oversight body with the information it needs to fulfill this obligation.

In a number of countries—including Chile, Honduras, and Mexico—the oversight body has a general responsibility to promote implementation of the law, which may include monitoring, providing training, interpreting the law, developing forms and other implementation tools, giving advice to applicants and/or public authorities, and making recommendations for reform. In some other countries, such as Uruguay and Nicaragua, a special body (which does not have oversight functions) is created with a wide mandate to conduct promotional activities. In Honduras, a Special Follow-up of the Transparency and Access to Information Law Commission was established to receive quarterly reports from public authorities and to formulate recommendations.

X. Conclusion

Latin America, despite being somewhat late in recognizing the right to information, has made great strides in this area in the last ten years. Leading OAS organs, including the OAS Special Rapporteur on Freedom of Expression and the Inter-American Court of Human Rights, have produced some of the most progressive international statements globally on the right to information.

Fourteen countries in the region have so far adopted right to information laws. As the analysis above demonstrates, for the most part these laws reflect better practice on the right to information in relation to each of its seven key attributes. The right to information laws of Latin America are quite progressive in a number of areas, such as underlying principles, scope of information and public authorities covered, enforcement of timelines, fees, duty to publish, restricting classification of information, historical disclosure and public education on the right to information. In other areas—such as provision of assistance to applicants, overriding secrecy laws and classification, the public interest override, partial release of information (severability) and independent administrative oversight bodies—Latin American right to information laws are, overall not so forward-looking.

Latin America has already made an important global contribution in terms of the right to information. The clear regional recognition of access to information held by public authorities as a fundamental human right is perhaps the most significant contribution. But the very strong track record of implementation in some countries, most notably Mexico, is also having an impact around the world. It is to be hoped that the region continues to play a leadership role on this key human right.

Freedom of Speech and Access to Information in Africa

AN INTERVIEW WITH PANSY TLAKULA, SPECIAL RAPPORTEUR
ON FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION
IN AFRICA OF THE AFRICAN COMMISSION
ON HUMAN AND PEOPLES' RIGHTS, BY PÉTER MOLNÁR

PÉTER MOLNÁR: In light of the Arab revolutions and their aftermath, how would you compare freedom of speech in North Africa and in Sub-Saharan Africa?

PANSY TLAKULA: What is popularly known as the Arab Spring has brought a lot of changes to the North African subregion of the continent, especially in the area of freedom of speech and demand for the right of the public to access information held by public institutions, amongst many other human right issues. The uprising that swept through the region clearly depicts various ways in which people could both claim and exercise their right to freedom of speech by being able to express their political opinions which might not be in tandem with the position of the government of the day.

The success of the uprisings in Tunisia and in Egypt led to the overhaul of the government in both countries, which has resulted in instituting the practice of democracy, accountability, free speech, and assembly under new constitutional frameworks. In Tunisia, there has been quite far-reaching repercussions of the changes that have taken place. In addition to the new government that was established, and the election of a new president, which was a milestone in the country, progress has been made with respect to freedom of speech and ensuring the promotion of the public's right to know through the enactment of a law on access to information.

The country hosted UNESCO for World Press Freedom Day in 2012. As part of the activities organized for the celebration of this very auspicious occasion and in support of the steps being taken toward promoting and protecting free speech in Tunisia, a public campaign on promoting and protecting freedom of expression was also launched in the country.

It is reported that since the fall of Ben Ali, several gains have been made in the area of securing freedom of expression in Tunisia, including “uncensored web access, the emergence of a culture of protest, an increase in the number of media outlets, and a flourishing of art, such as the art of caricature which has witnessed a boom since Ben Ali’s departure.”

Notwithstanding these developments, there are still ongoing violations of freedom of expression in Tunisia. These include attacks on media outlets and the arrest and attack of journalists for publishing certain materials, especially controversial religious articles. In this regard it is useful to note the reported arrest of three Tunisian journalists in February 2012 on charges of offending public morality following the publication of a nude photograph. Further, in April 2012, some journalists in the country were allegedly attacked for covering a Martyrs’ Day protest in Tunis, the Tunisian capital.

At a minimum, however, one can say that despite these instances of identified violations of the right to freedom of expression in parts of the country, there has been a lot of positive developments in Tunisia since the Uprising, especially in the area of promoting and protecting the right to freedom of expression and the public’s right to know. However, what the above-mentioned negative instances show is the need for continued vigilance by all stakeholders so as to prevent any attempt at rolling back on the gains that have been made so far, with the advent of the Uprising.

In the Republic of Egypt, it is reported that the status of freedom of speech deteriorated after the Revolution. For example, on April 24, 2012, a Haram Misdemeanor Court sentenced the famous Egyptian actor Adel Imam to three months’ imprisonment because he allegedly insulted Islam and those who wear the galabia and the veil. Similarly, censorship of journalists and media practitioners through, among others, closure of the main opposition news media, confiscation of printed copies of articles, in addition to arrest, detention and prosecution of journalists, for example the three journalists of Al Jazeera’s English-language network who were sentenced to at least seven years in prison on charges of broadcasting false reports of civil unrest, are all examples of constriction of media freedom in Egypt since the military takeover.

The other countries in North Africa are slowly but surely following the examples of Tunisia and Egypt, which have successfully transited post the onset of the Arab Spring.

In Sub-Saharan Africa, political conflicts are, to a large extent, caused by lack of free speech. Countries like Mali and Niger have [experienced] gross violations of freedom of speech. Freedom of speech in other countries like Cameroon, Ethiopia, Sudan, Somali, and Swaziland amongst others leaves a lot to be desired.

South Africa has been a top performer in the area of promoting the realization of free speech, especially since its 1996 Constitution, which is appraised as one of the most progressive in the world, particularly its Bill of

Rights, which includes a detailed guarantee of freedom of expression, including freedom of the press and other media. However, South Africa's position in that positive chart is being negatively affected by current efforts at enacting both the Protection of Information Bill and the Media Tribunal Bill into law. The latter Bill proposes making the country's press answerable to parliament. The Protection of Information Bill, on the other hand, negates the spirit and letter of both the South African Constitution and the Promotion of Access to Information Act (PAIA) (2000) by introducing new criminal offences such as publishing classified information, with a broad definition of "national security," while prescribing prison sentences for breaches of this proposed law. The Bill also restricts the ability of journalists to report any information deemed to be a government secret.

Overall, comparing situations in North Africa and Sub-Saharan Africa will not be appropriate as both parts of the continent have their own peculiarities and context.

PM: What in your view are the main improvements for free speech, freedom of the press and access to information since you have been in office? Are these general tendencies in Africa, or taking place, rather, in specific countries, or regions, and, if the latter, in which countries, or regions?

PT: I have been in office since 2005 and I must say a lot of gains have been made in this area of human rights through the work of my mandate. To summarize, as you know, freedom of speech and the press are guaranteed by most constitutions in Africa. However, the right to freedom of information has historically been construed as an integral part of the right to freedom of expression. This has made securing effective implementation of the right to freedom of information a bit of a challenge in many parts of the continent as only a few countries had national-level access to information laws back then, in 2005, when I took office as the Special Rapporteur on Freedom of Expression. Recognizing this problem in 2007, I applied for an expansion in my mandate at the Commission to expressly include promoting the right of access to information. This has helped tremendously in scaling up the level of attention that is being given to this issue by state parties to the Charter and the successful promotion and protection of the public's right to know which also helps in promoting the right to freedom of expression and free speech.

As part of the aforementioned initiative that I commenced in this regard, I started the process of drafting a Model Law on Access to Information in Africa in October 2010 and since then the following countries have adopted Access to Information Laws: The Republic of Guinea, the Republic of Liberia, the Federal Republic of Nigeria, the Republic of Niger, the Republic of Tunisia, the Republic of Sierra Leone and the Republic of Cote D'Ivoire. Meanwhile, the following countries still have bills pending adoption, some of

which have been influenced by the provisions of the draft Africa FOI Model Law. These include: Botswana, Burundi, Egypt, Ghana, Kenya, Mozambique, Senegal, South Sudan, Tanzania, and Zambia.

The Rwandese Bill was passed into law in February 2013, while both the Mozambican and South Sudanese Bills have been passed by parliament and now await Presidential Assent.

For Malawi, its Bill has been significantly revised with very strong inputs from the Model Law and it's going before Parliament as an Executive Bill.

Before the named countries adopted access to information laws, the only countries with such laws were Angola, Ethiopia, South Africa, Uganda, and Zimbabwe. To me, this is quite a triumph, [one] influenced by the humble effort of my mandate, in addition to the continuous advocacy engagement that I have undertaken on the issue with state parties to the African Charter.

I also recently launched a project on 5 May 2012 on the margins of World Press Freedom Day organized by UNESCO in Tunis, Tunisia. The project aims at decriminalizing libel/defamation offences in Africa.

PM: How do you propose the decriminalization of libel/defamation? Would you also decriminalize "hate speech"?

PT: As I submitted in one of my Activity Reports to the African Commission, it is clear that some legislative provisions criminalize certain types of speech (defamation and other types of "insult," sedition, false news) on the continent, which are used by government officials, politicians, and corporate interests to punish disapproved legitimate critical expression. It therefore goes without saying that I must advocate for the repeal of such laws. So, yes, I support decriminalization libel and hate speech—which is also why I was motivated to launch the project on this subject, as I mentioned earlier, in Tunis.

Libel involves making defamatory statements in a printed or fixed medium, such as a magazine or newspaper, and hate speech involves any forbidden/false speech/statement, gesture or conduct, written or displayed. If legislation protects both libel and hate speech to protect a person's reputation, such protection should not restrict other rights, such as the right to free speech. Additionally, the possibility of facing criminal charges for expressing an opinion on a public figure causes a chilling effect on the media and goes against the international and regional standards of freedom of expression. On this ground, libel and hate speech should be decriminalized.

PM: What do you think of the current state of responding to "hate speech"? To what extent, in your view, are you (in Africa) and we (globally) applying effective responses and engaging in ersatz displacement instead? (For example, by banning racist speech without effectively eliminating discrimination and structural racism.)

PT: The current state of responding to “hate speech” is through advocacy: Advocacy to understand the concept of “hate speech” and its negative impact on the right to free speech; advocacy to enact laws that comply with regional and international human rights norms and standards on freedom of expression; and advocacy to decriminalize libel and defamation laws. In my opinion this mode of response will go a long way toward securing protection for the right to free speech in Africa.

PM: What have been the main backlashes, if any? Are these general tendencies in Africa, or taking place rather in specific countries, or regions, and, if the latter, in which countries, or regions?

PT: In my opinion, I think the main obstacles or backlash result from lack of democratic principles and practice in many African countries. This is linked to my first observation, that some countries on the continent undermine the practice of liberal democracy, which includes the right to freedom of expression, freedom of speech and media independence, all of which are necessary ingredients for making electoral participation meaningful. Some governments on the continent are suffering from authoritarianism arising from their desire to maintain political power. Of course, the result of this includes the resurgence of coup d'états and other conflicts that also negatively affect the promotion and protection of freedom of expression and freedom of speech in Africa.

Furthermore, lack of legislation that expressly protects the right to free speech, or lack of implementation strategies for existing legislation as well as the practice of criminalizing the exercise of the right to freedom of expression and freedom of speech in certain contexts, is also responsible for some of the challenges being experienced in this regard on the continent. For countries that manage to transit to democratic practice, but witness incomplete transitions, new kinds of dictatorship emerge, especially where elections are manipulated and the common people are denied the opportunity of realizing their electoral aspirations. In many countries we see weak institutions and the rule of law not respected. All these also negatively affect the promotion and protection of the right to freedom of expression and freedom of speech.

We have also noticed a growing tendency toward lack of respect for democratic principles and practice on the continent. Some countries in francophone West Africa have been more strongly affected recently by this development, notably, Mali, Guinea-Bissau and Central African Republic.

PM: Do you think that the African court, in the foreseeable future, can play a major role in protecting free speech, freedom of the press and access to information in the continent?

PT: Yes, especially as it serves to complement the protective mandate of the African Commission. The African Commission receives complaints under Articles 47 and 55 of the African Charter, and some of these cases are related to violations of the right to freedom of expression and access to information. Since the decisions of the African Commission are nonbinding on states parties to the African Charter, with the existence of the Court, the Commission is now able to refer cases to the Court under Rule 118 of its Rules of Procedure. The Court's decisions are binding, and thus, if the Court takes a decision in cases which relate to the rights mentioned herein, this decision can be enforced in the state party concerned, thereby affording adequate protection for these rights, than was the case hitherto.

PM: How in your view has the Internet had an impact on freedom of speech, freedom of the press and access to information in general, and in Africa, in particular? Has it had a different impact in North Africa and in Sub-Saharan Africa, and if so, why and to what extent?

PT: The Internet and other computer-based communication systems have become common mediums of communication in Africa which should essentially serve to impact positively on freedom of speech, freedom of the press and access to information by expanding available tools for securing these rights. The development and growing usage of the Internet in Africa indicates the presence of some level of a knowledge base and political and economic "freedom" in Africa. Human rights organizations have been quick to embrace the Internet as a means of thwarting government attempts to suppress information about the violation of rights through using their electronic links with large international human rights organizations to quickly publicize human rights abuses and repressive practices of various governments on the continent. Thus, the Internet has allowed the media and information to reach more people, in more places, and permit information to flow across borders.

The impact in my opinion varies a bit in both North Africa and Sub-Saharan Africa. In North Africa, the impact of the Internet was more obvious during the Uprising as it played a major role in enabling the people to obviate some of the bottlenecks that the existing regimes had instituted to thwart the Uprising at the time. While before the Uprising, the Internet was used to express opinions much more than newspapers and TV channels, during the Uprising, people used the Internet to transmit pictures, videos, information and text messages about the demonstrations. As a result, in Egypt for instance, those in power at that time shut down mobile lines and hotline numbers and social media websites (including Twitter, Facebook and Bambuser) and newspaper websites were also blocked from public access.

In Tunisia, the Internet was used to protest during the revolutions, and before the revolution, the government censored the Internet through the use of filters which blocked certain expressions and websites from public access.

As part of the recognition of the positive impact of the Internet on freedom of expression and access to information, on 4 May 2012, during the commemoration of the World Press Freedom Day in Tunisia, the Tunisian Center for Freedom of the Press announced its training directory entitled "Internet and Freedom of Expression." This directory is said to be the first Arabic directory containing six of the social media websites and online blogs.

In Sub-Saharan Africa, the impact of the Internet on freedom of expression and access to information is low due to existing restrictive Internet policies and low Internet penetration rates. According to the International Telecommunication Union (ITU), access to the Internet is scarcer in Sub-Saharan Africa than anywhere else in the world. The factors which impede Internet penetration in Sub-Saharan Africa include inter alia: lack of knowledge, poor infrastructure, limited bandwidth, poverty, unreliable power supplies, outdated equipments, expensive Internet accounts and electronic messages which prohibit utilization by users.

Some sub-Saharan countries have however recognized the importance of the Internet to protect and promote freedom of the press and have made efforts to expand Internet access in their countries.

In April 2009, the government of Zimbabwe announced a plan to establish Internet cafés at post offices in rural areas; Ethiopia has also made attempts to increase available broadband by laying fiber optic cable along the country's major highways, connecting Addis Ababa to existing fiber optic networks in Port Sudan and Djibouti; Nigeria's National Information Technology Development Agency focuses on expanding Internet access to rural areas, supporting electronic governance, and increasing personal computer ownership.

Despite all these schemes, realizing the right to freedom of expression and access to information still remains wanting because the regulation of Internet content in Sub-Saharan Africa is still quite far from what it should be. Furthermore, many Sub-Saharan African countries have legislation that restrict the use of the Internet to access information, and others which are framed to monitor online fraud:

Nigeria has six bills dealing with computer misuse and cyber crimes: the Computer Security and Critical Information Infrastructure Protection Bill 2005 which could serve as a gateway to more extensive filtering or Internet controls; the Cyber Security and Data Protection Agency (Establishment, etc.) Bill; the Electronic Fraud Prohibition Bill 2008, the Nigeria Computer Security and Protection Agency Bill 2009, the Computer Misuse Bill 2009 and

the Economic and Financial Crimes Commission Act (Amendment) Bill 2010. All these bills were still not passed into law in Nigeria.

Zambia's cybercrime law provides for penalties of up to 25 years in prison for those convicted of hacking, and electronic fraud.

Zimbabwe's Post and Telecommunications Act of 2000 allows the government to monitor email usage and requires ISPs to supply information to government officials when requested.

PM: Thank you so much, Pansy for the interview.

PT: Thank you, Peter.

A Right Emerges: The History of the Right of Access to Information and Its Link with Freedom of Expression

HELEN DARBISHIRE

I. Introduction: An Enlightenment Idea in the Shadows: 1766 to 1989

Remarkable as it now seems in retrospect, for two hundred years after the adoption of the Swedish Freedom of the Printing Press Act in 1766 until the 1970s, there was almost no significant legislative movement on the right of access to information.

The benefits of openness had been posited during the 18th century when the word “transparency” was used in the works of political philosophers such as Jean-Jacques Rousseau (1712–1778), who promoted openness in his plans for the government of Poland in 1772, proposing that all public office-holders should operate “in the eyes of the public” and even wear a uniform so that they could never be anonymous.¹

France’s Declaration of the Rights of Man and of the Citizen of 1789 provides that citizens have the right to determine and follow the spending of taxes (Article 14) and that society has the right to demand accountability from all public bodies (Article 15).²

¹ Christopher Hood, “What Happens When Transparency Meets Blame-Avoidance?,” *Public Management Review* 9.2 (2007): 193–94. Hood cites Rousseau and states that philosophers Jeremy Bentham, Immanuel Kant, and, earlier, Baruch de Spinoza put forward similar ideas. It should be noted that these pre-20th-century concepts of transparency also include the notion of government according to stable and known rules, and the notion of maximum social openness (everyone under scrutiny by everyone else), as well as the notion of open government in the sense of public access to government documents.

² Déclaration des droits de l’homme et du citoyen (1789), <http://www.assemblee-nationale.fr/histoire/dudh/1789.asp>.

With limited versions of these principles enshrined in administrative codes and good government practice, only Sweden had a specific act until 1951 when Finland, an independent country since 1917, caught up with its own history: the drafter of the Swedish Act of 1766, Anders Chydenius, had in fact come from Finland.

There was, however, no general consensus that access to information is a fundamental right and it was not included in the catalogue of rights in the Universal Declaration of Human Rights (1948).

The post–World War II years saw a strengthening in a handful of countries of the mechanisms for accessing government information. The United States with the first iteration of the Freedom of Information Act in 1966 (it was upgraded after the Watergate scandal in 1974) was followed by France and the Netherlands in 1978.

The limited scope of these laws is reflected in the fact that they only apply to administrative information and/or establish a “right” only for the “administered” or “citizens” of that particular country.³ A clear example of this is France’s 1978 law, which was adopted with the title of the law on “improving relations between the administration and the public”⁴ and which only applies to the administrative activities of government. This law also typifies the earlier laws in the sense that it was a top-down instrument, part of a package of laws necessary for the functioning of a modern democracy and a service-oriented bureaucracy, but not a response to popular demand for a broad fundamental right to be enshrined in law.

In line with this approach, the Council of Europe in 1981 adopted a Recommendation to member states on “Access to Information Held by Public Bodies” which clearly limits the scope of the right: “Everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities *other than* legislative bodies and judicial authorities.”⁵

The Canadian Freedom of Information Law, adopted in 1983, also reflects this more restricted view of an administrative right: it can be exercised only by Canadian citizens and residents and only upon payment of an up-front C\$5 fee for each request. The Canadian law does not apply to the

³ For example, Australia’s 1982 law establishes “the right of the Australian community to access to information in the possession of the Government,” http://www.austlii.edu.au/au/legis/cth/consol_act/foia1982222/s3.html.

⁴ Loi n° 78-753 du 17 juillet 1978 portant diverses mesures d’amélioration des relations entre l’administration et le public et diverses dispositions d’ordre administratif, social et fiscal. Version consolidée au 20 décembre 2013, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000339241>.

⁵ Recommendation No. R (81) 19 of the Committee of Ministers to Member States on the Access to Information Held by Public Authorities, http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec%281981%29019_EN.asp. Emphasis added.

legislative or administrative branches, nor to private bodies performing public functions or operating substantially with public funds.

By the end of the 1980s, just a handful of countries had access to information or freedom of information law, and these were the Nordic countries (Denmark, Finland, Norway, and Sweden), some Anglo-Saxon countries (the United States, Canada, Australia and New Zealand), as well as the Netherlands, France, and Italy.

This initial batch of laws, while in many respects powerful tools for citizens to hold government accountable, were designed primarily to regulate communications between citizens and an increasingly large public administration. In 1990, only Finland and Sweden recognised access to information as a right in their constitutions, Norway subsequently did so (2004), whereas in none of the others is access to information a full-fledged constitutional right.⁶

II. Democratic Transitions and New Constitutions

The fall of the Berlin Wall resulted in a major push for the right of access to information, with it being enshrined in numerous of the constitutions of the new democracies. These constitutional provisions were then elaborated on and given effect in dedicated access to information laws in almost all of the former communist countries.

The change was driven by a strong and coordinated civic reaction to counter the information control exercised by the authoritarian regimes behind the Iron Curtain. Just as the Swedish Freedom of the Press Act was adopted in reaction to the suppression free thought and pamphleteering in an earlier time, it was a response to the information inequalities of Soviet bloc which led to the demand for a right to information in Central and Eastern Europe.

As so well depicted in the film *The Lives of Others*,⁷ the former communist regimes were characterised by limitations on the free flow of information: media outlets were in the hands of the state, the sharing of information both within and in and out of countries was tightly controlled, and extensive sur-

⁶ In New Zealand, Section 14 of the Bill of Rights Act 1990 reads: "Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form." Prior to passage of this Act, the New Zealand Court of Appeal had already described New Zealand's freedom of information legislation as "an Act of constitutional significance." See case of Commissioner of Police v Ombudsman [1988] 1 NZLR 385. The Bill of Rights affirms and extends that position, for example, influencing public access to court records. See *Mafart v. Television New Zealand Ltd.*, Sup. Ct. No. SC70/2006, [2006] NZSC 78, (2006) 18 PRNZ 394, www.Right2INFO.org.

⁷ *Das Leben der Anderen* (2006, dir. Florian Henckel von Donnersmarck).

veillance networks run by the secret police tried to keep tabs on what information circulated among the population.

Information did flow, mouth to mouth (with the Stasi and its equivalents in other countries listening in) and the use of samizdat journals, illegally printed and covertly distributed, was a feature of the dissident resistance struggle. Many argue that it was the surreptitious introduction of photocopying machines into countries such as Hungary and Poland that sped up the circulation of information and hence precipitated the fall of the Berlin Wall.

Everyone was hungry for information. Even in strictly controlled states like Albania, people would risk severe reprisals to put up television aerials at night to capture signals coming from across the Adriatic in Italy, or for those in the north of the country, from the relatively more open Yugoslavia.

These demands also have their origins in environmental concerns. In countries such as Bulgaria, the right to information movement was spurred by concerns about the health and environmental effects of the 1986 Chernobyl nuclear accident.

The opening up of the media space was an essential and exciting feature of the early years of the transition and was achieved relatively quickly, but significant power inequalities remained in many post-communist societies as the public authorities retained a stranglehold on information. Hence one of the early demands of civil society was for greater access to government information in line with the practices in established democracies, whether or not these countries had the formal mechanisms of access to information laws.

Thus the drafters of the new constitutions of the former communist countries established a right to information. For example, Romania's 1991 Constitution⁸ clearly states that:

1. A person's right of access to any information of public interest shall not be restricted.
2. The public authorities, according to their competence, shall be bound to provide correct information to the citizens in public affairs and matters of personal interest.

The language here is still not clearly a right to request and to receive in the sense of an access to information law, but nevertheless there is a clear concept here of the right of the public to have unfiltered information held by government, something which is "correct" and goes beyond propagandistic spin and implies original copies of real documents.

⁸ Constitution of Romania of 1991 as Amended and Completed by the Law No. 429/2003 on the Revision of the Constitution of Romania, Official Gazette of Romania, Part I, No. 758 of 29 October 2003, <http://www.cdep.ro/pls/dic/site.page?id=371>.

Similar constitutional provisions can be found in most of the former communist countries, and where the constitution was not fully clear, this has been clarified either by subsequent laws or the rulings of courts or information commissioners. For example, Slovenia's 1990 Constitution stipulates that "everyone has the right to obtain information of a public nature in which he has a well-founded legal interest under law."⁹ The 2003 Act on Access to Information of Public Character and its subsequent interpretation by the Information Commissioner and the courts makes clear that the exercise of the right and a desire to receive the information constitutes sufficient legitimate interest.¹⁰

The central role of the right in democracies was affirmed by constitutional courts in the region, notably in Hungary where the Court ruled in 1992 that access to information is a constitutional right essential for citizen oversight:

The publicity and accessibility of data of public interest is a fundamental right guaranteed by the Constitution, which also happens to arise directly from it. Free access to information of public interest promotes democratic values in elected bodies, the executive power, and public administration by enabling people to check the lawfulness and efficiency of their operations. Because of the complexity of the civic sphere, the citizens' sway over administrative decisions and the management of public affairs cannot be effective unless public authorities are willing to disclose pertinent information.¹¹

For such citizen control to be exercised, the right of access to information needs mechanisms that establish how requests for information should be submitted, the time frames for answering them and the appeals mechanism should access be denied. This was the next challenge of the right to information movement.

⁹ Constitution of the Republic of Slovenia, Article 39, <http://www.us-rs.si/en/about-the-court/legal-basis/>.

¹⁰ Slovenia's Act on Access to Information of Public Character, <http://www.ip-rs.si/index.php?id=324>.

¹¹ Decision 32/1992 (V.29) AB, 183–84 (as translated by the Office of the Hungarian Parliamentary Commissioner for Data Protection and Freedom of Information). In 1994, the Hungarian Court struck down a state secrets law, ruling that it imposed impermissible restrictions on the right to information. In so doing, the Court found that free access to data of public interest, including those held by the state, is one of the preconditions for the exercise of the right to free expression (Decision 34/1994 (VI.24) AB).

III. Civil Society Campaigns and Access to Information Laws

The post-communist civil society movement in Central and Eastern Europe was active in defining the legal framework that would put the new constitutional provisions into effect and ensure that they would work in practice for anyone interested in obtaining information from public bodies.

Hungary led the way with the adoption of its 1992 Act on Protection of Personal Data and Public Access to Data of Public Interest,¹² which became just the 12th access to information law in the world. Inspired by both Sweden's 1766 law¹³ and the United States' 1966 Freedom of Information Act,¹⁴ the Hungarian act grants a broad scope to the right in terms of both the bodies and the information to which it applies, being:

information or data other than personal data registered in any mode or form concerning activities undertaken and controlled by the body or individual carrying out state or local government responsibilities, as well as other public duties defined in relevant legislation, regardless of their mode of control, independent or collective nature.¹⁵

Subsequent laws adopted in the new democracies echoed and confirmed this breadth of scope of the right, securing a "follow the money" principle by placing an obligation on bodies which "manage public funds or operate with state property"¹⁶ or even to individuals which "as far as only their activities financed with funds from the consolidated state budget, subsidies from the European Union funds or allocated through EU projects and programs."¹⁷

¹² Hungary's Act CXII of 2011 on Informational Self-Determination and Freedom of Information, <http://www.rti-rating.org/files/pdf/Hungary.pdf>. Please note that this act was amended and weakened in 2013. See reports here: <http://www.freedominfo.org/2013/07/hungarian-ngos-call-foi-changes-as-unconstitutional/>.

¹³ See David Goldberg, introduction to the English translation of Peter Forsskal's "Thoughts on liberty" (1759), <http://www.peterforsskal.com/thoughts-on-civil-liberty>.

¹⁴ US Freedom of Information Act, 5 U.S.C. § 552, as Amended by Public Law No. 104-231, 110 Stat. 3048, http://www.justice.gov/oip/foia_updates/Vol_XVII_4/page2.htm.

¹⁵ *Supra* note 12, Article 3.

¹⁶ Slovakia's Act on Free Access to Information and Amendments of Certain Acts (2000), available in English at <http://www.rti-rating.org/files/pdf/Slovakia.pdf>.

¹⁷ Bulgaria's Access to Public Information Act (2000), <http://www.aip-bg.org/library/laws/apia.htm>.

The exercise of public power in any form also creates obligations to uphold the right of access to information in many countries, such as in Estonia's Public Information Act (2000),¹⁸ which establishes that:

The obligations of holders of information extend to legal persons in private law and natural persons if the persons perform public duties pursuant to law, administrative legislation or contracts, including the provision of educational, health care, social or other public services—with regard to information concerning the performance of their duties.

The impact of this new wave of constitutions and laws was therefore to establish access to information both as a fundamental human right and as a *sine qua non* of a democratic society. Democratic reformers in and out of government combined constitutional and rights-based arguments with comparative examples to press for strong access to information laws.

The environmental movement gave a boost to this process with the adoption in 1998 of the sector-specific Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.¹⁹ The Aarhus Convention was, in many countries, a foot in the door for the transparency movement. For example, in Bulgaria, the Access to Information Programme, the region's first dedicated access to information organisation founded in 1996, had its roots in campaigns for environmental information as well as the fight against corruption and broader human rights goals.²⁰

A. Transparency in and of the European Union

The European Union accession process was made full use of by campaigners to lever this change and so—even though there was no formal *acquis communautaire* (requirement to have a law) for states wishing to join the European Union—having an access to information law became part of the *de facto* signposts on the road to joining the club of the European Community.

¹⁸ Estonia's Public Information Act (2000), <http://www.legaltext.ee/text/en/X40095K2.htm>.

¹⁹ Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998), <http://www.unece.org/env/pp/documents/cep43e.pdf>.

²⁰ Access to Information Programme, *10 Years Access to Information Programme* (Sofia, 2007), http://www.aip-bg.org/pdf/aip_en_10y.pdf.

With respect to member state transparency, the EU had not gone further than to signal in declaration appended to the Maastricht Treaty of 1992 that “transparency of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in the administration,” referring to its own transparency. Nevertheless, all eight former communist countries which joined on 1 May 2004 had an access to information law, as did Romania and Bulgaria, which joined on 1 January 2007, and Croatia, which by the time it joined the EU on 1 July 2013 had already had an access to information law in force for ten years.

The European Union itself recognised a right of access to EU documents in 1997 in the Treaty of Amsterdam, and in 2001 adopted its own internal rules on access to documents held by its bodies, set out in Regulation 1049/2001,²¹ a text strongly influenced by the standards coming from the Nordic countries. This regulation provides a solid framework for accessing documents from EU bodies, although not all the limitations are subject to a public interest test. Excluded from this test are public security, defense and military matters, international relations, and the financial, monetary or economic policy of the Community or a Member State being absolute exceptions.²²

The Treaty of Lisbon, adopted in December 2009, confirmed a fundamental right of EU citizens to access documents held by EU bodies by including this in the fundamental rights chapter of the Treaty on the Functioning of the European Union.²³ Subsequent case law such as in the case of *Council of the European Union v. Access Info Europe*²⁴ has confirmed the link between this right and participation in EU decision-making as well as the right of citizens to hold public bodies to account for their actions.

The lack of a common standard for the right of access to information across Europe and the determination that the EU has no competence to require member states to have access to information laws as permitted countries in “old Europe” to have weak or no laws. Austria, Greece and Italy all lurk at the bottom of the Global RTI Rating with some of the world’s weakest legal frameworks for exercise of the right, and Cyprus and Luxembourg do not have laws. Malta only adopted a law after joining the EU (the law came

²¹ Regulation 1049/2001 Regarding Access to European Parliament, Council and Commission Documents, http://www.europarl.europa.eu/register/pdf/r1049_en.pdf.

²² See Article 4 of Regulation 1049/2001.

²³ Consolidated version of the Treaty on the Functioning of the European Union, Article 15 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>.

²⁴ *Council of the EU v. Access Info Europe*, Final Judgment in Case 280/11 P, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-280/11>.

into force on 1 September 2012) and Spain's substandard transparency law was adopted on 9 December 2013.²⁵

There has, however, been a positive impact of the right to information developments in Central and Eastern Europe on the situation in Western Europe. There has been a looping of democratic standard setting from West to East and back to the West again. For example, campaigners in Germany used the fact that the country was increasingly isolated by not having a national access to information law,²⁶ and successfully promoted the adoption of what became the 2005 Federal Act Governing Access to Information Held by the Federal Government.²⁷

With Northern, Central and Eastern Europe having increasingly strong access to information laws and much debate in civil society, governmental and intergovernmental circles about the importance transparency in a modern democracy, the Council of Europe in 2002 updated its 1981 Recommendation, with adoption of Recommendation (2002)2 of the Committee of Ministers to member states on access to official documents.²⁸

The shift from use of the term "information" to "official documents" is the least helpful thing about a text which otherwise sets out the basic elements of a right to ask governments for information, and even then the definition of "official documents" is broad, covering "all information recorded in any form, drawn up or received and held by public authorities and linked to any public or administrative function, with the exception of documents under preparation."

Public authorities are public bodies at all levels of government and administration, including bodies which are natural or legal persons insofar as they perform public functions or exercise administrative authority.²⁹ Once again, the administrative transparency view prevailed, with the legislative and judicial powers excluded, although member states encouraged to "examine" the application of the right to these bodies (Article II). On a positive note, the Recommendation makes clear that this is a right of everyone which "should apply without discrimination on any ground, including that of national origin" (Article III).

²⁵ See Global RTI Rating for details, www.rti-rating.org.

²⁶ See Manfred Redfels, "Informationsfreiheit: Deutschland als verspätete Nation Warum die Bundesrepublik sich schwer tut mit dem Abschied vom 'Amtsgeheimnis,'" <http://www.netzwerkrecherche.de/files/ifg-deutschland-als-verspaetete-nation.pdf>.

²⁷ Germany's Federal Act Governing Access to Information Held by the Federal Government (Freedom of Information Act) (2005), http://www.bfdi.bund.de/cae/servlet/contentblob/412040/publicationFile/24681/TextIFG_EN.pdf.

²⁸ Recommendation Rec(2002)2 of the Committee of Ministers to Member States on Access to Official Documents, <https://wcd.coe.int/ViewDoc.jsp?id=262135>.

²⁹ Ibid.

Discussion continued at the Council of Europe about a binding legal instrument or even an additional protocol to the European Convention, but a number of states resisted this.³⁰ The specific objection was to recognising the right of access to information as a human right. The European Court of Human Rights was particularly reluctant and as late as 2003 stated “it is difficult to derive from the Convention a general right of access to administrative data and documents.” To do so would have been to create the highly unusual situation of the Court affirming a right that in 2003 was not yet fully respected or even recognised as a right in many of Europe’s more powerful nations.

Hence, even though most of the new laws were already wider in scope, Recommendation (2002)2 stopped short of extending the right to the legislative and judicial branches, and made it optional for member states to legislate for the right to apply to other bodies exercising power, performing public functions, or operating with public funds.

In spite of this, many of the laws adopted after the promulgation of Recommendation (2002)2 maintained a higher standard, for example, by applying the right to a broad range of public bodies. An exception is the German law which does not apply to non-administrative information held by the legislative and judicial branches. Overall, however, the movement to promote the right to information in Europe has achieved stunning results in a short period of time: today 42 of the 47 Council of Europe member countries have rules setting out mechanisms for access to information and although they vary in quality, most meet the minimum standard for this right as set out in the Convention on Access to Official Documents. All the major European countries have access to information laws, and those that do not are smaller countries, namely Cyprus and Luxembourg (both EU members) along with the microstates of Andorra, Monaco, and San Marino.

B. The Mexican Wave

As with post-communist Eastern Europe, the democratic transitions in Latin America played a significant role in advancing the right to information. In Mexico, the Grupo Oaxaca, a gathering of intellectuals, academics, journal-

³⁰ See the documents and meeting reports of the Council of Europe’s Working Group on Access to Official Documents (DH-S-AC). In particular, the minutes of the meeting of 22–24 September 2004 which state “The great majority of experts did not favour an additional protocol to the European Convention on Human Rights” (para. 25) and that if a treaty of some kind were to be adopted it should be “flexible” and “[t]he experts accepted that this instrument would, of course, not provide an absolute right, but one which was balanced by appropriately framed protection arrangements for particular interests.” Available at http://www.coe.int/t/dghl/standardsetting/cddh/DH-S-AC/11th_en.pdf.

ists and activists, promoted and helped to draft Mexico's Federal Law on Transparency and Access to Public Information.³¹ The Mexican law was adopted in 2002 by the government of President Vicente Fox who in 2000 had become the first president of Mexico to be elected from an opposition party, ending the 71 years of one-party rule by Mexico's Institutional Revolutionary Party, the PRI.

The Mexican access to information law is a broad instrument whose functioning is assured by a well-resourced commission, the Federal Institute for Access to Public Information and Data Protection (Instituto Federal de Acceso a la Información y Protección de Datos [IFAI]), which is headed by five information commissioners empowered, *inter alia*, to search the files of public bodies and to order the disclosure of information.

Other laws adopted in the Latin American region, such as Peru's 2002 law³² were also inspired by the movement to promote the right to information in Eastern Europe and by also South Africa's comprehensive Promotion of Access to Information Law (2000)³³ as well as the proximity to the United States and knowledge of its FOIA. Numerous exchanges and study visits took place ensuring a strong cross fertilisation of experiences, strategies, and standards. The Council of Europe's Recommendation was translated into Spanish by civil society activists and distributed in the region. As well as being a strong player in the global right to information movement, the Latin American experience also resulted in the first ruling from an international human rights tribunal that access to information is a fundamental human right.

IV. Recognition of the Right of Access to Information

A. Key Human Rights Tribunal Cases: Claude Reyes and TASZ

It is perhaps appropriate that, in light of the huge efforts made by the democratisation movements in Eastern Europe and Latin America, it is from these two regions that cases were taken to international human rights tribunals that resulted in the formal recognition of access to information as a human right. The success of national-level campaigns to secure a strong legal and constitutional basis for the right to information created a context in which the international human rights system could now recognise a right of access to infor-

³¹ See Issa Luna Pla, "Movimiento social del derecho de acceso a la información en México published by the Universidad Nacional Autónoma de México" (2009), <http://biblio.juridicas.unam.mx/libros/libro.htm?l=2629>.

³² Peru's Law on Transparency and Access to Public Information (2002), <http://www.minedu.gob.pe/normatividad/leyes/Ley27806.php>.

³³ See the South African History Archives, http://www.saha.org.za/interests_and_links/access_to_information.htm.

mation held by government bodies overcoming—particularly in the case of the European Court of Human Rights—their previous reluctance to do so.

The two key cases are *Claude Reyes et al. v. Chile* and *TASZ v. Hungary*. Both cases were taken by representatives of civil society organisations (CSOs) who needed to access information in order to participate in public debate on matters of public importance: an environmental protection campaign in Chile and debate about a new drugs law in Hungary.

The case of *Claude Reyes et al. v. Chile* began on 6 May 1998 when three environmental activists working with the NGO Terram Foundation presented an access to information request to the Chilean government for copies of the background and environmental checks that should have been carried out on the US-based company Trillium Corporation, which had been given permission to start a major logging project in the native *lenga* forest of the Rio Condor valley.

The environmental activists, including a member of the Chilean parliament, an academic, and Marcel Claude Reyes, at the time executive director of the Terram Foundation, wanted to know whether the Chilean government's Foreign Investment Committee had done a proper review of the possible environmental impacts of the Rio Condor Project, and whether its members had checked out Trillium Corporation's track record of sustainable logging. The only information they ever received in response to the question was the total value of Trillium's investment in the project.

The Chilean courts rejected the claim that the right to information had been violated. Indeed, they rejected the idea that such a right existed; all appeals were summarily dismissed as “manifestly ill-founded,” including one by the Chilean Supreme Court on 31 July 1998. The Rio Condor project was halted from time to time, including once as a result of a Supreme Court order, and eventually abandoned. But the question of the behaviour of the Chilean government and its lack of transparency remained and was appealed to the Inter-American Court of Human Rights.

After a public hearing in Buenos Aires in April 2006 in which the Chilean government tried to avoid answering the question of whether or not it had actually carried out the relevant checks and therefore whether or not it held the requested information, the Inter-American Court of Human Rights issued a clear and strong decision on 19 September 2006 in which it found that the Chilean government had violated the right of access to information which the Court asserted was protected by the protection of freedom of expression and information under Article 13 of the American Convention on Human Rights.³⁴ The first ruling by an international human rights tribunal that freedom of expression also guarantees a general right of access to

³⁴ For the case of *Claude Reyes et al. v. Chile*, see http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_esp.pdf (Spanish original) and http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf (English).

state-held information is hugely significant. The decision in the case of *Claude Reyes et al. v. Chile* states in its key paragraph 77:

[T]he Court finds that, by expressly stipulating the right to “seek” and “receive” “information,” Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case.

The court also made clear that no particular interest needed to be proved by the requestor of the information, the public interest in access and dissemination being sufficient:

The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, *the right to freedom of thought and expression includes the protection of the right of access to State-held information*, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State. (Emphasis added)

This decision, which also ordered the Chilean government to take the necessary measures to ensure respect for the right, including through the training of public officials, had a significant impact in Chile, which in 2008 incorporated the right into its Constitution at Article 8 and adopted a law that entered into force in April 2009. In other countries in the region and beyond, the ruling has been used by campaigners to argue for the adoption of access to information laws.

The ruling encouraged civil society in Europe to take an appeal to the European Court of Human Rights to press for full recognition of the right to information. The decisive case was brought against Hungary, perhaps appropriately given its role as a pioneer country for this right in Eastern Europe. The case was taken by the Hungarian Civil Liberties Union (TASZ), which had submitted a request to Hungary’s Constitutional Court for access to a parliamentarian’s complaint questioning the constitutionality of criminal leg-

isolation concerning drug-related offences. The Constitutional Court refused to release the information, arguing, somewhat bizarrely, that it was the personal data of the parliamentarian, and with no higher instance to turn to, the applicants appealed to Strasbourg.

In contrast to the position taken by the Chilean government in the *Claude Reyes* case, the fact that the right of access to information was already well established in Hungary meant that the Hungarian government did not dispute the existence of a right but rather argued that in this particular case the refusal was appropriate. In its ruling of 14 April 2009,³⁵ the European Court of Human Rights disagreed, noting that it seemed “quite implausible that any reference to the private life of the MP, hence to a protected private sphere, could be discerned from his constitutional complaint.”

The Court underlined that it would be “fatal for freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of their personality rights” and that such arguments could not be called upon to justify the restriction on access to information and consequent interference with freedom of expression as protected by Article 10 of the European Convention on Human Rights.

The Court argued that when a public body holds information which is essential either for the media to play their role as “public watchdogs” or for civil society to play a “social watchdog” function, then to withhold that information is an interference with freedom of expression. The judges achieved this paradigm shift by arguing that when a public body holds information and refuses to release it, it is exercising the “censorial power of an information monopoly” and hence should have supplied the information to those requesting it.

The ruling that access to information is a human right in the European context resolved a tension that had cast a shadow over many of the debates around the right in the 20 years since the fall of the Berlin Wall: What kind of right is this and, depending on the answer to that question, what is the scope of the right and how should it be balanced against other rights such as the right to privacy?

B. Doubts about the Right in the Convention on Access to Official Documents

This debate over this right was not just an academic one. It affected the scope of national access to information laws and the different interpretations clashed during the drafting by the Council of Europe of the world’s first bind-

³⁵ Case of *Társaság a Szabadságjogokért v. Hungary* (App. No. 37374/05), ECHR, 14 April 2009, para. 36, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92171>.

ing instrument on access to information, the Convention on Access to Official Documents.

The drafting of this Convention took place during 2006–2008, so drafting was completed just a year before the rulings of the European Court of Human Rights. While some member states—supported by the Parliamentary Assembly of the Council of Europe,³⁶ civil society observers, and information commissioners—argued that access to information is a right which implies that it should be broad in scope and apply to all branches of government and all bodies performing public functions, others disagreed.

At a 27 March 2008 meeting of the Council of Europe's Steering Committee on Human Rights, the chair of the Committee expressly rejected the notion of a right to information, arguing that if member states had thought this was a right, they would have adopted an additional protocol to the European Convention rather than a stand-alone treaty.³⁷ As a result, the treaty whose drafting was completed by November 2008 once again followed the narrower interpretation contained in the Council of Europe's previous Recommendations, limiting the mandatory scope of the obligation to provide information to the exercise of administrative authority.³⁸

It is entirely possible that if the Convention had been drafted one or two years later, with key decisions being taken after the rulings of the European Court of Human Rights, the scope of the right contained in the Convention would have been significantly different, with a broader and stronger right. It is likely that during the coming period, additional cases will be taken to the European Court which confirm a broad right, and this will lever signing of the optional provisions of the Convention and most likely in due course will result in either a change to the Convention or a *de facto* position taken by the monitoring body that full respect for the right of access to information means guaranteeing access to information held by all branches of power, and all bodies exercising public power or operating predominantly with public funds.

³⁶ Parliamentary Assembly of the Council of Europe Opinion on Draft Convention on Access to Official Documents, <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta08/EOPI270.htm>.

³⁷ See *supra* note 27 and the minutes of the meeting of the Steering Committee on Human Rights, 25–28 March 2008, at which the author was present. Available at http://www.coe.int/t/dghl/standardsetting/cddh/Meeting%20reports%20committee/66th_en.pdf.

³⁸ The treaty was opened for signature on 18 June 2009 and to date has been signed by 14 states (about 30% of the Council of Europe member countries), and at time of writing had been ratified by 6 countries. See <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=205&CM=1&CL=ENG>.

C. The UN Human Rights Committee: An Obligation to Openness

In July 2011 the UN Human Rights Committee issued a General Comment on Article 19 of the International Covenant on Civil and Political Rights, para. 2 of which states: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." The Committee found that the right to freedom of expression includes a right of access to information held by public bodies and by private bodies performing public functions. States should recognise this right in law and respond to requests for information. Furthermore, it is a right which places an obligation to provide information proactively: "To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information." General Comment No. 34 is a milestone in the development not only of the right to information but in defining a modern democratic society, and in setting out a human rights basis for the relationship between the people and the governments they elect.

In terms of scope, if access to information is now indeed a human right which applies to all branches of government, then those whose laws are limited in scope—countries including Austria, France, Germany and Italy, and now Spain—will need to amend them. This has not something which has happened and activists still have a challenge ahead of them in these countries.

The identification of a proactive publication obligation in the General Comment is also important. Logically, if the only channel for access to information were via requests filed by individuals, huge information inequalities would rapidly arise with different people knowing different things about the functioning of government, with large sections of the population remaining ill informed, to the detriment of society as a whole. Such a system would also place an intolerable burden on public officials who would have to strive to answer huge volumes of requests from information-hungry citizens. Proactive disclosure therefore levels the playing field for access to government-held information.

D. Consolidation of International Jurisprudence on the Right

In spite of these positive developments, there was still a certain nervousness in the international right to know community that there would be a reversal in the direction that the right was moving. Of particular concern was the possibility that the European Court of Human Rights would not continue the

line it had been taking, particularly if subsequent cases came before a different chamber of judges.

As it was the next access to information case to be decided by the Strasbourg Court, in June 2013, was heard by the same second chamber which had ruled on the two Hungarian cases. The case of *Youth Initiative for Human Rights v. Serbia* concerned the refusal of the Serbian intelligence agency to provide the appellant civil society organisation (CSO) with information about electronic surveillance, even after it had been ordered to do so by the Serbian Information Commissioner.³⁹ In finding a violation of Article 10, the Court also confirmed the existence of a right of access to information and cited General Comment No. 34 of the UN Human Rights Committee as well as declarations by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression, and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression, which also confirm the existence and scope of the right of access to information.⁴⁰

A further decision of 28 November 2013 in a case against Austria, this time coming from the judges of the first section of the court, confirmed the very clear line being taken in favor of the right of access to information. In this case a CSO was seeking information about land records from a regional land register, the Tyrolean Real Property Transactions Commission. Not only did the court rule that the refusal to provide this information was a violation of freedom of expression but stated that given the "considerable public interest" in the land records it "the Court finds it striking that none of the Commission's decisions was published, whether in an electronic database or in any other form."⁴¹

V. Future Challenges for the Right to Information

It is not yet fully clear what will be the longer-term repercussions of formal recognition by international human rights tribunals that access to information is a fundamental right. Three main issues can be identified. The first is the scope of the right and whether it applies to private bodies. The second is the

³⁹ Case of *Youth Initiative for Human Rights v. Serbia*, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-120955>.

⁴⁰ Ibid, paras. 13, 14 and 15.

⁴¹ Case of *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria*, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-139084>. Paragraph 46 cited.

reach of the obligation to publish information proactively without waiting for requests for information. The third is the right to reuse information for any purposes without further conditionality being attached.

It is logical to conclude that if access to information is a human right then it applies to private bodies, at least under some circumstances that still have to be worked out and defined. After all, other rights should be upheld by private bodies as well: the right to privacy as articulated in data protection laws applies to information held by all legal entities that hold personal data. As far as the right of access to information goes, the most progressive law is the South African law which applies to all private bodies if the information relates to or can be used for protection of other human rights.⁴²

Next, the finding by the UN Human Rights Committee that there is a proactive publication obligation created by the right of access to information needs to be developed. The Council of Europe Convention on Access to Official Documents at Article 10 requires proactive disclosure and although it is rather vaguely worded but nevertheless sets only a very basic standard:

At its own initiative and where appropriate, a public authority shall take the necessary measures to make public official documents which it holds in the interest of promoting the transparency and efficiency of public administration and to encourage informed participation by the public in matters of general interest.⁴³

The Explanatory Memorandum to the Convention elaborates on this, stating that citizens need information “to form an opinion on the authorities that govern them and to become involved in the decision-making process. National rules on proactive publication are thus encouraged.”⁴⁴ Examples of the classes of information which should be published proactively include: “[I]nformation about their structures, staff, budget, activities, rules, policies, decisions, delegation of authority, information about the right of access and how to request official documents, as well as any other information of public interest.”⁴⁵ The proposed mechanism is that disclosure be “done on a regular

⁴² South Africa’s Promotion of Access to Information Act (2000), Section 50, states there is a right to ask for a “record [that] is required for the exercise or protection of any rights.” Available at http://www.acts.co.za/prom_of_access_to_info/index.htm.

⁴³ Council of Europe, Convention on Access to Official Documents, 18 June 2009, <http://conventions.coe.int/Treaty/EN/Treaties/Html/205.htm>.

⁴⁴ Explanatory Report to the Draft Council of Europe Convention on Access to Official Documents, para. 71, <http://conventions.coe.int/Treaty/EN/Reports/Html/205.htm>. It will be noted that the recommendation from the OSCE Representative on Freedom of the Media which was submitted to the drafters of the Convention has been taken into consideration in defining the classes of information.

⁴⁵ *Ibid.*, para. 72.

basis and in formats including the use of new information technologies (for example, web pages accessible to the public) and in reading rooms or public libraries, in order to ensure easy, widespread access."⁴⁶

Many access to information laws contain similar provisions as and define the classes of information which should be published. The questions therefore remain: Which information should be published proactively, and when and how?

These are the challenges which face the future of the right of access to information. Like the democracy and human rights which it is instrumental in supporting, the right to information will need constant defence and promotion over the coming years. It is nevertheless a right which has become significantly stronger during the past 20 years. It is even possible to argue, as this article endeavours to illustrate, that if the Berlin Wall had not fallen, the right of access to information would have remained a limited statutory right enjoyed in no more than a handful of countries, poorly echoed by weak provisions in the administrative laws of a few other countries. As it is, thanks largely to the democracy movement in Central and Eastern Europe, access to information is now clearly established as a fundamental human right. The challenge now—by no means an easier one—is to ensure that it is respected in practice.

⁴⁶ Ibid., para. 71.

The Right to Information and the Expanding Scope of Bodies Covered by National Laws since 1989

SANDRA COLIVER¹

I. Introduction

Recognition of the right to information (RTI) has expanded dramatically over the past quarter century. In November 1989, only 13 countries had laws granting their citizens a right to information held by public authorities,² and the right had not been recognized as a human right by any intergovernmental body. Instead, the right to freedom of expression, codified in the leading human rights treaties, was interpreted to provide only a right to seek, receive, and impart information free from government interference or, at most, a right to receive government-held information that was necessary to protect a fundamental right.³ At the national level, citizens might have been able to obtain

¹ This article is based on information supplied by contributors from more than 60 countries, see <http://right2info.org/about#contributors>. Special thanks are due to Helen Darbishire, Executive Director of Access Info Europe for much of the information about European countries.

² See Open Society Justice Initiative (OSJI), *Countries with Access to Information (ATI) Provisions in Their National/Federal Laws* (April 2014), at <http://www.right2info.org/laws/constitutional-provisions-laws-and-regulations>. The 13 countries and dates of adoption are Sweden 1766, Finland 1951, USA 1966, Denmark 1970, Norway 1970, France 1978, Netherlands 1978, Australia 1982, Canada 1982, New Zealand 1982, Colombia 1985, Greece 1986, and Austria 1987.

³ For instance, the European Court of Human Rights, in 1987, ruled that “The right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. . . . [It] does not . . . embody an obligation on the government to impart . . . information” (*Leander v. Sweden*, 9 Eur. Ct. H.R.433, 26 [1987]). See also, e.g., *Roche v. United Kingdom*, 42 Eur. Ct. H.R. 30 (2005).

certain information pursuant to administrative procedure codes and broad principles of government accountability, but denials of requested information were generally difficult to challenge.

The fall of the Berlin Wall gave impetus to a wave of enactments, beginning with adoption of laws by Hungary and Ukraine in 1992. From then until the present, 25 other countries in Central and Eastern Europe and the former Soviet Union, and 59 countries in other parts of the world passed access to information laws.⁴

By February 2014, 99 countries had national-level right to information laws or regulations in force—including the population giants of Brazil, China, India, Indonesia, Russia, and the United States, nearly all of the countries of the Europe Union and Council of Europe, more than 70% of the countries of Latin America, 15 in Asia and the Pacific, 13 in Africa, and 3 in the Middle East.⁵ Some 60 countries grant constitutional status to the right (either expressly or implicitly, as interpreted by their top courts).⁶ More than 5.5 billion people now live in countries that provide an enforceable right, at least in law, to obtain information from their governments.⁷

Moreover, it is now widely recognized that the right to information held by public bodies is protected by the main human rights treaties and has developed into a norm of customary international law.⁸ The African Commission on Human and Peoples' Rights issued a Declaration of Principles in 2002 making clear that the African Charter on Human and Peoples' Rights grants the right to information to everyone in the African Union's 53 member states; and the Inter-American Court on Human Rights, in 2006, authoritatively interpreted the American Convention to guarantee the right to information in the Americas.⁹ The United Nations (UN) Special Rapporteur on Freedom of Expression (an independent expert mandate), along with experts of the Organization for Security and Cooperation in Europe (OSCE) and the Organization of American States, issued a joint statement in 2004 that

⁴ OSJI, *Countries with Access to Information (ATI) Provisions in Their National/Federal Laws*, *supra* note 1.

⁵ OSJI, *Countries with Access to Information (ATI) Provisions in Their National/Federal Laws*, *supra*, note 1.

⁶ For lists of countries whose constitutions guarantee the right and whose top courts have interpreted their constitutions to guarantee the right, see Constitutional Protections, <http://right2info.org/constitutional-protections-of-the-right-to>.

⁷ This figure was reached by adding the population figures provided by Wikipedia for the 99 countries.

⁸ Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, 2nd ed. (UNESCO, 2008), 7.

⁹ Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Session, 17–23 October, 2002: Banjul, Gambia; and *Claude Reyes et al. v. Chile*, Judgment of Sept. 19, 2006, para. 77.

the right to freedom of expression includes the right to government-held information, and in 2006, issued a further statement, joined by the recently appointed Special Rapporteur on Freedom of Expression of the African Commission on Human and Peoples' Rights. In 2011, the UN Human Rights Committee adopted a General Comment (considered an authoritative interpretation of the obligations imposed on states by the International Covenant on Civil and Political Rights) recognizing that Article 19 of the Covenant, declaring the right of "everyone" to freedom of expression, also guarantees to everyone the right of access to information held by public bodies.¹⁰ The European Union has recognized a right to information held by Community institutions since 2001.¹¹ In 2008, the Council of Europe adopted the first multilateral treaty affirming and articulating an enforceable, general right to information,¹² and in 2012 the Grand Chamber of the European Court of Human Rights ruled that "freedom to receive and impart information and ideas" includes a right to receive information of public interest held by public authorities.¹³

The rapid proliferation of statutory, constitutional and international guarantees of the right to information is noted not in order to suggest that the public's enjoyment of the right to information has in fact improved around the world. While there is some evidence that in most countries, save for the most autocratic, people tend to enjoy better access to information once a law is passed than previously,¹⁴ the point made here is that the proliferation of national laws occurred in a short period of time, quickened by the collapse of the Soviet empire; and that the right to information, unlike many other fundamental rights, received explicit legal protection first at the national level and only recently at the regional and international levels.

While the right evolved first at the national level, it has only been since the right's affirmation at the international level that consensus is developing concerning the contours of the right. The most important international instruments to address the *elements* of the right are the Model Inter-

¹⁰ UN Human Rights Committee, General Comment 34 on Article 19, U.N. Doc. CCPR/C/GC/34 (12 Sept 2011).

¹¹ Regulation (EC) No. 1049/2001 of the European Parliament and the Council provides a right of public access to European Parliament, Council and Commission documents.

¹² Council of Europe Convention on Access to Official Documents, adopted by the Comm. of Ministers on 27 Nov 2008, opened for signature and ratification on May 27, 2009, ratified by six countries as of October 2013.

¹³ *Gillberg v. Sweden*, no. 41723/06, Grand Chamber Judgment of 3 April 2012. See also *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, ECHR Judgment of 14 April 2009; and *Kenedi v. Hungary*, no. 31475/05, ECHR Judgment of 26 May 2009.

¹⁴ See, e.g., Open Society Justice Initiative, *Transparency and Silence: A Survey of Access to Information Laws in 14 Countries* (2006), 11.

American Law on Access to Public Information (“Model Inter-American Law”) adopted by the OAS General Assembly in 2010; the General Comment issued by the UN Human Rights Committee in 2011; and the Model Law on Access to Information for Africa (“Model Law for Africa”) issued by the African Commission on Human and Peoples’ Rights in 2013.¹⁵ As a result, the international standards now are more progressive than most national-level laws, in particular, the laws of established democracies that adopted their laws before the fall of the Berlin Wall. This paper addresses the discrepancies between the international standards and national law in one important area, namely, concerning the range of bodies that are obliged to disclose information.

The first section, an overview, begins with an analysis of the requirements of the Model Laws and the General Comment, noting the few differences among them, and then surveys the trend over the past 20 years for right to information laws to be applied to a growing number and range of bodies. The section advances the contention that expansive coverage promotes not only consistency and predictability, but enjoyment of the right to information itself, given that exemption of whole agencies precludes access to information even of overriding public interest held by such agencies. Subsequent sections examine the expansion in coverage in various countries to virtually all executive and administrative bodies, including the intelligence and security agencies, heads of state, and cabinets; judicial and legislative bodies; and private entities that perform public functions or receive public funds regardless of the nature of the functions. These sections include considerable detail about good law and practice in the hope that readers may find examples that will be particularly persuasive in their own country contexts, and also advance policy arguments as to why right to information laws should apply to a full range of public and private bodies, with exceptions for withholding information based on the nature of the information rather than the body that holds the information. The last section makes the argument that right to information laws should apply to private bodies not only that perform public functions but also that receive public funds. While only slightly more than a dozen laws explicitly extend to such private bodies, the number is steadily growing and there are sound arguments for such coverage, including that citizens are entitled to know how public funds are used, and that regulators have a poor record of holding entities accountable in the absence of public scrutiny.

¹⁵ Model Inter-American Law on Access to Public Information, Doc. AG/RES. 2607 (XL-O/10), adopted on June 8, 2010, Art. 3; General Comment, *supra* note 9; and Model Law on Access to Information for Africa, issued by the African Commission on Human and Peoples’ Rights, April 2013.

II. Range of Bodies Covered: Overview

The basic principle set forth in international instruments, model laws and case law is that the public has a right of access to information held by public authorities and some private entities, subject only to a limited number of narrowly drawn exceptions that are necessary to protect legitimate interests. The public authorities and private entities that are obliged to provide information, however, vary across regions and among countries. The narrowest approach, somewhat surprisingly—at least to those who think that the United States has one of the strongest freedom of information (FOI) laws in the world—is exemplified by the US FOI Act (FOIA), which, by its terms, applies only to executive agencies of the federal government.¹⁶ Somewhat broader than that is the traditional European approach, reflected in the Council of Europe Convention on Access to Official Documents, which calls for laws to apply to government and administration at national, regional and local level; “legislative bodies and judicial authorities in so far as they perform administrative functions according to national law,” and “natural or legal persons in so far as they exercise administrative authority.”¹⁷ The RTI laws of more than half of the 47 member states of the Council of Europe now apply to a broader range of information than required by the Convention, including legislative information (and not merely information related to the administrative functions of legislative bodies), and nearly one-third apply their laws to judicial information.

The Model Inter-American Law calls on states to adopt laws that impose disclosure obligations on all public authorities, including the executive, legislative and judicial branches at all levels of government, constitutional and statutory authorities, “non-state bodies that are owned or controlled by government,” and also to “private organizations which operate with substantial public funds or benefits (directly or indirectly) or which perform public functions and services,” but only concerning those funds, public functions or public services.¹⁸ Most laws of the Americas are not as expansive as the Model Law. For instance, Mexico’s law, adopted in 2002 and considered among the most progressive in the world owing to strong procedural protections and a powerful information council, does not apply to private entities, even those that perform public functions.¹⁹

¹⁶ FOIA 1966, as amended, 5 U.S.C. § 552(f)(1).

¹⁷ Council of Europe Convention on Access to Official Documents, *supra* note 11, at Art. 2(a).

¹⁸ Inter-American Model Law, *supra* note 14, Sec. 3.

¹⁹ Federal Law on Transparency and Access to Public Government Information, Art. 3(IX).

The Model Law for Africa sets forth a yet more expansive scope: it applies, in addition to the bodies listed in the Model Inter-American Law, to private bodies that (a) receive public funds (regardless of whether “substantial” as specified in the Inter-American Model Law) concerning those funds, and (b) to the extent that information they hold “may assist in the exercise or protection of any right.”²⁰

India’s Right to Information Act 2005 is among the laws that apply to almost all of the bodies recommended by the Inter-American Model (although India’s law exempts some intelligence and security agencies listed in a schedule to the law, and “cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers”).²¹ The laws of Liberia and Nigeria, adopted in 2010 and 2011 respectively, include most of the language of the Model Law for Africa, although they do not extend to private bodies that hold information that may assist in the exercise or protection of any right. Three countries that do cover such private entities are South Africa, Kenya (by its constitution of 2010), and Rwanda, although in terms slightly different than those used in the Model Law.²²

The following sections discuss entities to which right to information laws apply, and demonstrate the trend toward expansion in the range of bodies covered by such laws. Of course, even as the range of bodies is expanding, exceptions continue to be applied, thus limiting effective access to information. Trends concerning interpretation and application of exceptions lie outside the scope of this paper.²³

The term “right to information” (RTI), which is gaining increasing currency, is used in this article because it most aptly communicates the key element of these laws. The term “freedom of information” has been particularly associated with the laws of anglophone and US- or UK-influenced states, a few German-influenced countries (Germany, Austria, Switzerland), and has been understood in some contexts to refer only to the right to seek, receive

²⁰ Model Law for Africa, supra note 14, Sec. 1 (definition of “relevant private body”) and Sec. 2(a) and (b).

²¹ See India Right to Information Act, No. 22 of 2005, Art. 2(h); Liberia FOIA 2010; Nigeria FOIA, signed into law on 28 May 2011.

²² South Africa’s Constitution, Sec. 32, and Promotion of Access to Information Act (PAIA) 2000, SS. 1, 9(a) and 12, and Kenya’s 2010 Constitution, Sec. 35(1) guarantee a right of access to any information that is held by any “person” and that is “required” for the exercise or protection of any right. Rwanda’s 2013 law, Art. 2(4), applies to a private body that holds information relevant to “rights and freedoms of people.”

²³ For discussion of exceptions to access, see, e.g., David Banisar, *Freedom of Information Around the World: A Global Survey of Access to Government Information Laws*, Privacy International (2006); and Toby Mendel, “The Right to Information in Latin America,” elsewhere in this book.

and impart information free from government interference. “Access to” information (without express inclusion of “right”) is the term used in the titles of most laws in Europe, Latin America and Africa. “Right to information” is used in several of the most recently enacted laws and ordinances, including those of Albania (adopted 1999), Bangladesh (2008), Croatia (2003), Guinea (2010), India (2005), Mongolia (2011), Nepal (2007), Turkey (2003), and Yemen (2012).

RTI laws promote several objectives, expressly stated in many constitutions and laws, including to make possible the full exercise of the right to freedom of expression, enable the public to reach informed opinions concerning the functioning of government, foster democratic accountability and good governance, reduce corruption and maladministration, and increase public confidence in public agencies. Expanding the scope of bodies covered by RTI laws promotes these objectives. Including all bodies under one law, subject to carefully drawn exceptions, enables exceptions to be narrowly tailored so as to withhold only information whose disclosure would likely cause harm to important interests. Moreover, addressing transparency via a comprehensive RTI law rather than by a patchwork of laws promotes consistency concerning the scope of information covered and interpretation and application of exceptions. Exceptions to access are most consistent with the right to information when based on the nature of the information and not on the nature of the entity that holds the information.

III. Application of RTI Laws to All Levels of Government

The RTI laws of unitary, nonfederated countries generally apply to all levels of government: national, regional (where applicable) and local. For instance, the Council of Europe Convention on Access to Official Documents, reflecting the law of most of the Council’s 47 member states on this point, provides that the right to have access to official documents shall apply to “government and administration at national, regional and local level.”²⁴ While the RTI laws of countries that grant considerable autonomy to subnational government entities—including Australia, Austria, Canada, Germany, Mexico, South Korea and the United States—have applied only to the federal (central) government, the states in most of these countries have also adopted laws that apply to state and local bodies (e.g., Australia, Canada, the United States).²⁵ Germany is the main exception; of its 16 *Länder* (states), five – whose populations account

²⁴ Convention on Access to Official Documents, *supra* note 11, Art. 1(2)(a)(i).

²⁵ All six of Australia’s states and two of its territories, all of Canada’s provinces and territories, and all of the states of the USA and the District of Columbia have freedom of information laws.

for nearly half of Germany's total population – have yet to pass RTI laws.²⁶ Moreover, a few countries with federal systems have applied their RTI laws to all levels of government; these include India (RTI Act adopted 2005) and Portugal (law amended 1999). A 2007 amendment to Mexico's Constitution expressly requires the state and local governments to adopt their own laws that meet certain basic transparency standards.²⁷

IV. Executive/Administrative Bodies

Most RTI laws apply to most agencies of the executive branch of government. Some laws—such as those of Canada, Ireland, New Zealand and the United Kingdom—include a schedule that lists the covered bodies. A few—such as South Korea's—refer to another statute that lists the covered bodies. Still other laws—such as India's—list exempted agencies in a schedule to the statute or in regulations or laws expressly referenced in the statute. In many countries, the intelligence and special services, military and police forces, and the offices of the head of state, head of government and cabinets are exempted in whole or in part, although in modern statutes increasingly they are covered, subject to exemptions for national security, deliberative process and related grounds. For instance, India's RTI Act 2005 applies to all three branches of the armed forces, the Ministry of Defence, the Coast Guard, the Department of Atomic Energy, nuclear power plants, aeronautics and space research organizations (except the Aviation Research Centre), and state civilian and armed police organizations.

A. Intelligence and Security Agencies

There are several reasons why intelligence and security agencies should *not* be exempted from disclosure obligations. First, such agencies produce a lot of documents that are invaluable to researchers, scholars and the public that do not reveal anything about confidential government actions. For instance, in the US, the Central Intelligence Agency (CIA) held extensive documents concerning Saddam Hussein's history of human rights abuses.²⁸ None of these CIA documents reveal anything about US policies or CIA activities, but they

²⁶ Walter Keim, 30 August 2012, <http://home.altibox.no/wkeim/files/120830un.html>.

²⁷ Constitución Política de los Estados Unidos Mexicanos, Diario Oficial de la Federación [D.O.], 20 July 2007 (Mex.).

²⁸ See "Saddam's Iron Grip: Intelligence Reports on Saddam Hussein's Reign," *National Security Archive Electronic Briefing Book No. 167* (18 October 2005), www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB167/index.htm.

do reveal a great deal of information of public interest about what Saddam Hussein did and what and when the US knew about his deeds. Second, in several countries, application of RTI laws has led to exposure of scandals or wrongdoing that might not have come to light but for the laws. Third, the national security exception has proved effective in keeping information secret (pursuant to RTI laws) that governments have sought to keep secret.

In Europe, the intelligence and special services are covered by the RTI laws of most countries, although much of the information they hold is subject to exceptions—in particular for national security, including protection of state secrets and diplomatic relations. In several countries, such as Bulgaria, courts have confirmed that the secret services are covered.

The FOI laws of Australia, Canada, and the UK completely exempt some or all of the intelligence agencies from coverage.²⁹ A few countries, such as India, allow intelligence and/or security services to be exempted, but only pursuant to an order of the relevant minister. The United States has a more demanding process for allowing exemption of intelligence information: only “operational files” of intelligence agencies may be exempted from the FOIA, and only by a statute duly passed by both Houses.³⁰ For instance, a bill to exempt the operational files of the Defense Intelligence Agency was defeated in 2000 because the bill, if passed, would have shielded from disclosure the activities of foreign death squads, torturers and other human rights abusers.³¹ While exempting only “operational files” is more narrowly tailored than exempting whole agencies, the term “operational files” has, in practice, been interpreted broadly.

Interestingly, several laws—including those of India, Brazil, Guatemala, Mexico, Peru, Uruguay, Albania and Romania—expressly provide that information about human rights violations, violations of law in general, and/or corruption may *not* be withheld.³²

An increasing number of countries are publishing their intelligence budgets and/or staff numbers. For instance, Brazil, Canada, the Netherlands, Serbia and the United Kingdom have disclosed baseline intelligence spending information. In 2007, the government of France published its intelligence budget total for 2004. The US government has published the aggregate figure

²⁹ Paul Hubbard, “Freedom of Information and Security Intelligence: An Economic Analysis in an Australian Context,” *Open Government Journal* 1.3 (2005): 4.

³⁰ “Operational files” of several intelligence agencies—including the CIA—are exempted from the FOIA.

³¹ The bill was defeated following strong opposition of the nongovernmental National Security Archive and several other NGOs. See “Archive Calls on CIA and Congress to Address Loophole Shielding CIA Records from FOIA,” National Security Archive Briefing Book No. 138, “Proliferation of the Problem” (15 October 2004).

³² See, e.g., India’s RTI Act, Sec. 24(2) and (4); Mexico’s law, Art. 14; Romania’s law, Art. 13; Albania’s Law on Classified Information, Sec. 10.

for all intelligence-related activities since 2007 pursuant to law, and did so also in 1997 and 1998. The fact that some countries, including those with substantial intelligence sectors, publish intelligence budgets for some years suggests that, as a general rule, suppression of such information is unnecessary to protect important interests.

Most armed forces and defense departments in European and other democracies are covered by their country's RTI laws, except for agencies expressly exempted, such as intelligence offices. For instance, in the United Kingdom, the armed forces are covered, except for the special forces and "any unit or part of a unit which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in the exercise of its functions."³³ Australia's RTI Act includes similar language.³⁴

Ireland is the only state in Western Europe that completely exempts the police from the coverage of its law. While many countries exempt information relating to criminal investigations by the police or judiciary, in most countries considerable information is subject to disclosure, at least in theory, including information about numbers and assignments of police, department budgets and results of disciplinary proceedings. The rule across Europe and Latin America is that restrictions on disclosure, even regarding security and criminal investigations, are better handled through exemptions based on the nature of the information rather than on the identity of the body holding the information.

B. Heads of State/Government and Cabinets

Traditionally, information concerning the deliberations of, and preparations for decisions by, the head of government and/or his/her close advisors was not available to the public. Such information continues to be expressly exempted from the access to information laws of several commonwealth countries (including Australia, Canada, South Africa and Uganda), and at least six European countries (Denmark, Greece, Iceland, Netherlands, Norway, Portugal). Minutes of cabinet meetings and other papers have routinely been withheld in other countries pursuant to exemptions for "documents in preparation" ("internal documents" or "policies under development") and protecting "the deliberative process of a public authority" ("the free and frank exchange of opinions," "predecisional advice").

Nonetheless, several countries—by legislation, practice or court order—have begun to make some, even most, cabinet papers available, especially when the public interest in access overrides any justifications for

³³ FOI Act, 2000, Schedule 1, Art 6.

³⁴ FOI Act, 1982, Sec. 11.

secrecy. For instance, in New Zealand, the Official Information Act 1982 does not contain any blanket exemptions for cabinet confidences. Cabinet documents are routinely disclosed on the Internet and by other means and ministers are encouraged to proactively release such material.³⁵

Section 8 of India's RTI Act provides that "the decisions of the Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete," subject to the other exemptions in the Act. Japan's law provides that "Cabinet bodies and bodies under Cabinet jurisdiction that were established by law" must disclose their administrative documents.³⁶

In Bulgaria, agendas and summaries of the meetings and decisions of the Council of Ministers have been available online on the website of the Council of Ministers since at least 2005. Since August 2009, when the new prime minister ordered the internal information system of the Council of Ministers to be made accessible online, all decisions, meeting records and minutes of the Council of Ministers adopted since 1990 are publicly available.³⁷

Hungary's Constitutional Court, in 2006, addressed one of the perennial obstacles to information access: the failure of governments to keep records. The Court ruled that the government is under an obligation to keep records, because failure to do so would otherwise directly and seriously restrict the right of access to public information and, accordingly, instructed the legislature to pass a law requiring records to be kept of government sessions.³⁸ The legislature duly passed such a law which, among other things, amended the law regulating the preparation of minutes of cabinet meetings. However, the Constitutional Court's decision has not been fully implemented.³⁹

The government of the United Kingdom decided in February 2010 to drop its proposal to exempt cabinet papers from the FOI Act.⁴⁰ This means that cabinet papers may only be withheld based on existing FOI exemptions for policy formulation and ministerial communications, which are subject to the Act's public interest test. As a result, information should be released if the public interest in disclosure overrides the reasons advanced for secrecy. Four of the six occasions, as of January 2013, on which the UK government

³⁵ See "New Zealand" in David Banisar, *Freedom of Information Around the World: A Global Survey of Access to Government Information Laws*, Privacy International (2006).

³⁶ Law No. 42 of 1999 concerning Disclosure of Information Held by Administrative Organs, Art. 2, para. 1.

³⁷ Information supplied by Access to Information Programme, email dated 8 December 2009, on file with the author.

³⁸ Constitutional Court, 13 July 2006, *Magyar Közlöny* (Official Gazette) 2006/84.

³⁹ Email from Adam Foldes, then with Transparency International–Hungary, 27 October 2009, on file with the author.

⁴⁰ Campaign for FOI (UK), press release, 25 February 2010.

vetoed decisions of the Information Commissioner were to block the release of cabinet or cabinet committee minutes: twice about the war in Iraq, and twice about devolution of power to Scottish institutions.⁴¹ The veto is judicially reviewable, which provides some check on the government's veto power.

The US FOIA applies to the Executive Office of the President,⁴² but does *not* apply to the president, his immediate staff, and entities within the Executive Office of the President whose functions are limited to advising and assisting the president (including the vice president, the National Security Advisor, the National Security Council, and the White House Counsel).⁴³

V. Legislative and Judicial Bodies

Almost all of the RTI laws in Latin America apply to legislative and judicial bodies.⁴⁴ In addition, most RTI laws in other parts of the world, including several in the Commonwealth, apply to legislative bodies, and legislative bodies are covered by separate laws in several additional countries. Fewer RTI laws apply to judicial information. Other laws and fundamental fair trial principles provide grounds for judicial transparency but these do not afford as much access to documents as do the RTI laws.

Most countries in Europe extend the right to information to legislative and judicial bodies at least concerning their "administrative functions." These are generally understood to require publication of information about the structure and organization of public bodies; their decrees, policies and regulations; budget, procurement and financial information; information about salary scales; and contact information for the public information officer.⁴⁵ However, within these broad categories, there is considerable variation from country to country. For instance, information about the judicial career (including selection criteria and procedures, promotion and disciplinary measures) in a number of countries is considered to be administrative in nature and thus subject to disclosure, while in other countries, such information is treated as nonpublic judicial information.

⁴¹ Parliamentary and Constitutional Centre, House of Commons Library, "FOI and Ministerial vetoes," 28 January 2013.

⁴² FOIA, 5 U.S.C. § 552(f)(1).

⁴³ Dept. of Justice, FOIA Post (2002), <http://www.usdoj.gov/oip/foiapist/2002foiapist30.htm>.

⁴⁴ Mendel, "The Right to Information in Latin America," elsewhere in this volume.

⁴⁵ See, e.g., Armenia's Law 2003, Art. 7(3); Dominican Republic's Law 2004, Art. 5; Germany's Law 2005, Sec. 11; Honduras's Act 2006, Art. 3.9 and 4; Ireland's FOI Act 1997, Sec. 15(1) and 16(1); Mexico's Federal Law, Art. 7 and 9; Slovenia's Act 2005, Arts. 8 and 10.

Sections A and B, below, describe the laws that apply to the legislature and judiciary and some of the issues that arise. Section C then examines, and rejects, the main reasons advanced for not applying RTI laws to these branches of government, and notes that, for good reason, the emerging trend is to apply RTI laws to all branches of government, including concerning legislative and judicial, not merely administrative, information.

A. Legislative Bodies

RTI laws provide access to *administrative* information held by legislative bodies in virtually all European countries. Norway is one of the few countries in Europe that does not grant a right of access to at least administrative information held by its parliament.⁴⁶

In addition, the public has a right of access to at least some legislative information held by legislative bodies in at least 24 countries in Europe. In 19 countries, legislative information comes within the scope of the RTI laws themselves.⁴⁷ In at least 5 other countries—the Czech Republic, France, Georgia, Germany and the Netherlands—the public has a right of access to legislative information pursuant to laws other than the RTI law. Of the 14 countries of Latin America with RTI laws—Argentina, Brazil, Chile, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru and Uruguay—all but Uruguay and Colombia expressly apply their laws to the legislature, although Mexico and Chile do so only to a limited extent.⁴⁸ The laws of at least 6 countries in Africa (Guinea, Liberia, Nigeria, Rwanda, South Africa, and Uganda) apply to legislative information, as do the laws of Australia, India, Israel and South Korea and the Constitution of the Philippines.⁴⁹

In countries that recognize a right of access to information held by the legislative branch, a major question concerns the extent to which individual members of parliament (MPs) are, or should be, subject to disclosure require-

⁴⁶ Norway's FOI Act 2006, Sec. 2.

⁴⁷ The 19 countries are Albania, Armenia, Bosnia & Herzegovina, Bulgaria, Croatia, Finland, Ireland, Latvia, Lithuania, Macedonia, Moldova, Montenegro, Romania, Serbia, Slovakia, Slovenia, Sweden, Switzerland and the United Kingdom.

⁴⁸ See Mendel, "The Right to Information in Latin America," elsewhere in this volume. Note, however, that Mendel counts only 13 countries in Latin America as having RTI laws. This is explained by the fact that he does not include Argentina, which has an executive decree rather than a full fledged law. Argentina's decree is counted in this chapter because it is judicially enforceable, and is functionally similar to laws, such as the law of Colombia, that apply only to the executive branch.

⁴⁹ For texts of these laws, see <http://www.right2info.org/laws/constitutional-provisions-laws-and-regulations>.

ments. RTI laws generally apply only to records by, or relating to, MPs and local representatives that are held by legislative or other governmental bodies. Thus, requests for information are made to the bodies that hold the desired information, and individual MPs may intervene to object to disclosure. Claims of MPs for expenses and reimbursement, including for food and travel, increasingly are treated as subject to RTI laws.⁵⁰ Arguably, elected representatives should themselves be covered, subject to exceptions to protect privacy and independence of political parties, if the presumption is accepted that entities that perform public functions or are funded by public monies should be covered by RTI laws.

B. Judicial Bodies

Countries are increasingly recognizing a public right of access to significant amounts of judicial information, including final and interim judicial decisions; case files; and transcripts of, and documents offered in, public court hearings. Judicial information now appears to be covered by the RTI laws of at least 34 countries, including India, South Korea, three countries in Northern Europe (Belgium, Netherlands and Sweden), at least 6 countries in Africa (Guinea, Liberia, Nigeria, Rwanda, South Africa, and Uganda), 10 in Latin America (Brazil, Chile, Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Peru) and 13 in Central and Eastern Europe (Albania, Armenia, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Latvia, Macedonia, Moldova, Montenegro, Romania, Serbia, Slovenia).⁵¹ At least another 13 countries plus Hong Kong apply their laws to *administrative* information held by the judicial branch: Australia, New Zealand, and 11 countries in Europe (the Czech Republic, Denmark, France, Georgia, Germany, Hungary, Ireland, Norway, Slovakia, Turkey and the United Kingdom).

⁵⁰ Information commissioners and courts in several jurisdictions—including Israel, Japan, South Korea, Scotland and the United Kingdom—have established that claims of MPs for expenses and reimbursement are subject to disclosure. The Scottish parliament has for several years proactively published on its website detailed travel claims of members in a searchable database. The High Court of England and Wales required the disclosure of actual claim forms and supporting documentation submitted by MPs. See *Corporate Officer of the House of Commons v. The Information Commissioner & Ors* (2008) EWHC 1084 (Admin) (16 May 2008). The Tokyo District Court ordered Tokyo's governor to disclose details of travel costs he and a group of legislators incurred in July 1996. *Legislators' Foreign Travel Expense Receipts*, Tokyo District Court. The decision was upheld by the Supreme Court. Information supplied by Prof. Lawrence Repeta.

⁵¹ See <http://right2info.org/laws> (links to the respective countries' laws); see also Due Process of Law Foundation, *Access to Judicial Information in Latin America* (2007).

In most countries whose RTI laws do not apply to judicial information, access to some such information is nonetheless provided pursuant to constitutional principles of “transparency,” “publicity” or “democratic accountability”; criminal and civil procedure codes; laws on public procurement and ethics; judicial regulations; or simply the court’s own conclusion that transparency is desirable. In these countries, however, access tends to be more restricted than in countries with applicable RTI laws. Moreover, judicial information is often withheld, both in countries with and without applicable RTI laws, on various grounds, including the privacy of the parties and witnesses; the prevention, investigation and prosecution of criminal activities; the equality of parties in court proceedings; the effective administration of justice; and the protection of minors. Categories of important information that often are not subject to disclosure include interim as well as final judgments (often owing to privacy concerns); transcripts of court proceedings; information in case files, including information referred to in open court; information about judges’ qualifications and the processes and criteria by which they are selected, promoted and disciplined; and statistics, e.g., concerning the number and length of cases handled by each judge or court, and information about procedures courts follow in handling cases.

C. Reasons for Extending Full Coverage to Legislature and Judiciary

The rationales that call for transparency of the executive—including public financing, and the public’s right to accountable governance—apply with equal force to the legislature and judiciary. The arguments for exempting legislative and judicial bodies can be fully addressed through a combination of appropriate exceptions and mechanisms to address any separation of powers concerns.

Opposition to applying an RTI regime to legislative and judicial authorities stems principally from two notions.⁵² The first is that existing mechanisms, such as the right to a public trial or the right to attend meetings of legislative bodies, adequately ensure transparency of the activities of the legislative and judicial branches. Many countries, especially mature democracies, do indeed have traditions of openness concerning the conduct of legislative and judicial proceedings. In the case of judicial authorities, however, it is generally only the courts that carry out some of their business in public, and not other bodies in the judicial branch, such as those that make decisions

⁵² The broad arguments in this section are drawn from a paper titled “Briefing Regarding the Elaboration of a Council of Europe Treaty on Access to Official Documents,” by Access Info Europe, ARTICLE 19, and OSJI, issued by the Council of Europe Steering Committee for Human Rights, DH-S-AC(2006)009bil (10 November 2006), 8.

regarding selection, promotion and discipline of judges. Furthermore, openness in the judiciary is limited to what is necessary to ensure the fairness of trials and does not take into account wider considerations of the public interest. In the case of legislative bodies, meetings and their records are usually open to the public, but this is generally not true of the documents and reports on which legislators base their decisions. In any case, the fact that a considerable degree of openness exists already in the legislative and judicial branches should argue in favor of, rather than against, extending the scope of RTI laws to these branches.

The second objection is that an overarching access to information regime for all three branches of government would contravene the principle of separation of powers. Governments can readily address this objection by adopting measures that comply with their own legal systems and traditions. Some countries have separate laws that address the legislative and judicial branches but basically mirror the substantive and/or procedural protections of the general RTI law. For instance, the laws of Mexico and Chile apply the substantive provisions of the RTI law to judicial and legislative bodies, but require the judiciary and legislature to establish their own procedures for overseeing the law's implementation.

Regarding the judiciary, a third argument is often advanced that judicial authorities should be exempt because they hold mainly sensitive information, such as materials in case files and criminal investigations. However, documents that need to be withheld to protect legitimate rights or interests may and should be withheld on those grounds, rather than on the ground that they are held by a particular institution.

The European Court of Human Rights has implicitly ruled that judicial and legislative information of public interest is subject to disclosure.⁵³ The applicant in the case, the Hungarian Civil Liberties Union (HCLU), had sought access to a pleading filed by an MP with the Constitutional Court calling on the Court to invalidate recent amendments to the Criminal Code.⁵⁴ The government did not contest that there had been an interference with the applicant's right to information of public interest under Article 10 of the European Convention on Human Rights, but asserted that the interference had been justified in order to protect the MP's privacy. The Court dismissed this justification and, in a landmark judgment, ruled that "freedom to receive and impart information and ideas" includes a right to receive information of

⁵³ Társaság a Szabadságjogokért (HCLU) v. Hungary, Application No. 37374/05 (14 April 2009).

⁵⁴ The Hungarian Constitutional Court had, until that time, interpreted the right to freedom of expression expansively. See P. Molnar, "Towards Better Law and Policy against Hate Speech," in I. Hare and J. Weinstein, eds., *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009).

public interest held by public authorities. Hungary's Constitutional Court has both judicial and legislative functions. It is not, strictly speaking, part of the judicial branch, but it does interpret and apply the law to particular facts. It is also an institution whose decisions affect law-making and legislative policy. The judgment thus is significant not only for establishing the existence of a right to information under the European Convention but also for applying that right to information of judicial and legislative character.

VI. Private Entities That Perform Public Functions or Receive Public Funds

Most RTI laws now provide for access to information held by some public corporations and/or private entities that perform public functions or provide public services, and increasingly the more modern laws, and the model laws for Africa and the Americas, also apply to entities that receive public funds, as least as regards the use of those funds. In addition, the laws of South Africa and Rwanda, the constitutions of South Africa and Kenya, and the Model Law for Africa apply to information held by private entities that a person needs to exercise or protect a right.⁵⁵ Precisely which entities are covered, however, often is unclear given the multiplicity of kinds of entities that perform public functions or receive public funds.

First, there are state-owned enterprises (SOEs), also called government-owned or public corporations, which are legal entities created by a government to undertake commercial or business activities on behalf of the government. The defining characteristics of these SOEs are that they have a distinct legal form and are established to operate in commercial affairs. Most SOEs are established by government, but some commenced as private entities that were then nationalized. SOEs can be fully or partially owned by the government.

SOEs are generally fully guaranteed by the government; for example, in Finland, state-run corporations, even though responsible for their own finances, cannot be declared bankrupt. In contrast, the state may own an interest, even a controlling interest, in ordinary limited-liability corporations (discussed below as private entities that receive government funding).

SOEs are covered by most RTI regimes in Europe, the Americas and Africa, by 6 of the 11 countries in Asia with RTI provisions (India, Japan, Nepal, the Philippines, South Korea and Thailand, and also Hong Kong), and by Israel, Jamaica and New Zealand. However, China's Disclosure of Government Information regulations, which entered into force in May

⁵⁵ See *supra* note 21.

2008, do not apply to SOEs,⁵⁶ and Indonesia's Law on Public Information Transparency, passed in April 2008, applies to SOEs only to a limited extent, pursuant to a compromise reached after civil society strongly objected to the government's proposal to exclude SOEs entirely.⁵⁷

Second, there are private entities that exercise administrative authority, perform public functions, provide public services, or receive public funds. These elements are closely related, and there is considerable lack of precision concerning what is understood to constitute "administrative authority" and "public functions," as well as concerning the amount of funding that subjects an entity to general disclosure requirements. The following sections discuss those concepts.

A. Entities That Exercise Administrative Authority, Perform Public Functions, or Provide Public Services

"Administrative authority" generally means the authority to regulate, for instance, by professional licensing and standard-setting bodies. "Public functions" generally include "administrative authority" and the provision of statutory services and any other important public services, for instance, those that protect public safety and security, and may encompass a broad range of other services, e.g., including health care. Trash collection is considered a public function in most jurisdictions, but not in all. Armenia's RTI law enumerates functions of "public importance" expansively to include "sport, education, culture, social security, transport, communication and communal services."⁵⁸

Most entities that perform public functions also exercise administrative authority. Notable exceptions are government-financed broadcasters which, although they may not exercise administrative authority, are considered in many countries to perform a public function. Virtually all entities that perform public functions or exercise administrative authority receive substantial public financing, but some—such as professional licensing boards in some countries—may be all or substantially funded by membership dues. Moreover, an entity could receive substantial public funding and yet perform duties other than public or administrative functions. For instance, private institutions that receive funding for scientific research generally are not considered to perform a "public function" although their work furthers the public interest.

Information held by private bodies that exercise "administrative authority" or perform "public functions" appears to be covered by the RTI laws of most

⁵⁶ See Provisions of the People's Republic of China on the Disclosure of Government Information 2007, adopted by the State Council, 17 January 2007, effective 1 May 2008, Art. 37.

⁵⁷ See Indonesia's Act No. 14/ 2008, Art. 14.

⁵⁸ Armenia's FOI Law, Art. 3.

European countries (though not the United Kingdom), as well as at least 17 other countries: in Africa (Angola, Guinea, Liberia, Niger,⁵⁹ Nigeria, Rwanda,⁶⁰ South Africa); 7 in the Americas and Caribbean (Antigua and Barbuda, Belize, Ecuador, Guatemala, Nicaragua, Peru, and Trinidad and Tobago), and 3 in Asia and the Pacific (Australia, New Zealand and South Korea).⁶¹ The right has constitutional as well as statutory protection in Kenya, Poland, Serbia and South Africa, and a 2004 amendment to Panama's Constitution created a constitutional right to information held by private companies involved in work of a public nature.⁶² In a few additional countries, e.g., Israel and Jamaica, application of the RTI law to private bodies requires an order of the Minister of Justice or other responsible minister.⁶³ The laws of several of these countries—including the Czech Republic, Hungary, Iceland, Ireland, Liberia, the Netherlands, Peru and Slovakia—as well as the Model Laws for Africa and the Americas specify that only information related to public functions is subject to disclosure obligations.⁶⁴ Hungary's law usefully extends coverage so as also to include "matters related to [the entities'] financial management,"⁶⁵ an extension which appears to be implicit in most of the other laws.

B. Entities That Receive Public Funds Regardless of the Functions They Perform

A smaller, but steadily growing number of countries extend coverage to entities that receive public funds without reference to whether or not they perform public functions. Among the countries whose laws apply to such private entities are India, Liberia, Nigeria and South Africa; at least six countries in Latin America (Dominican Republic, Ecuador, Guatemala, Honduras, Nicaragua, and Panama); and at least four European countries (Denmark,

⁵⁹ Niger's 2011 law applies, pursuant to Art. 3, to "bodies with a public interest function."

⁶⁰ Rwanda's law, by Art. 2(4), applies to private bodies that carry "any business in relation to public interest."

⁶¹ See Right2Info, "Private Bodies and Public Corporations," (2013), <http://right2info.org/scope-of-bodies-covered-by-access-to-information/private-bodies-that-have-a-public-character>; and Mendel, *Freedom of Information*, supra note 7, 80, 90, 120, and 140.

⁶² See constitutions of Panama, as amended 15 November 2004, Art. 45; Poland, Art. 61(1); Serbia, Art. 51(2); South Africa, Sec. 32.

⁶³ Israel's FOI Law 1998, Sec. 2, definitions, para. J; Jamaica's ATI Act 2002, Sec. 3, Definitions.

⁶⁴ Czech law, Art. 2(2); Hungary's Act 1992, Art. 19(1); Iceland's Information Act, Art. 1; Ireland's FOI Act 1997, Sched. A, para. 2; Liberia's FOI Act, Sec. 1.4(d); Peru's Law 2002, Art. 9; Slovakia's Act 2000, Art. 2(1); Inter-American Model Law, Sec. 3; Model Law for Africa, Sec 1 (definition of "relevant private body").

⁶⁵ Hungary's Act 1992, Art. 19(1).

Ireland, Montenegro and Serbia)⁶⁶ although the laws of two of these countries—Denmark and Ireland—provide that coverage may be extended to private entities only pursuant to a specific order issued by the relevant minister and, at least in Ireland, few such private entities have yet been so designated.

The amount of public funds required to subject private entities to RTI requirements varies. The laws of Denmark and Serbia suggest that more than 50% public funding is required.⁶⁷ India's Central Information Commission determined that a private entity will be considered to be substantially financed by the government if it receives grants or loans from the central or state governments totaling more than (a) INR 2.5 million (about US\$60,000) or (b) 75% of its total budget.⁶⁸ More recently, the Madras High Court found that receipt of 37% of total funding from public sources sufficed to subject a private college to the RTI Act; the Court interpreted "substantial" to mean "real or actual" as opposed to trivial.⁶⁹ None of the six Latin countries that apply their laws to private entities specify the amount or percentage of public funding required to trigger disclosure obligations.

The model laws for Africa and the Americas assert that RTI laws should apply to entities that receive public funds but only concerning the use of those funds. This is the approach taken by the laws of Ecuador, Nicaragua, Liberia and Nigeria.

The laws of the United Kingdom and the United States apply to private entities only to a very limited extent. The issue made headlines in the UK in 2007 when the government initiated a consultation on whether or not to extend the scope of the FOI Act to some private entities.⁷⁰ The Campaign for FOI, a leading nongovernmental FOI organization, submitted a paper that noted, among other things, the main categories of entities not currently covered by the FOI Act. These included more than 5,500 public-private partnerships, as well as private- and voluntary-sector bodies providing services

⁶⁶ India's RTI Act 2005, Sec. 2(h)(d); South Africa's PAIA, Sec. 8; Dominican Republic's ATI Law, Art. 1; Ecuador's ATI Law, Art. 3; Guatemala's ATI Law, Art. 4; Honduras's ATI Law, Art. 3(4); Nicaragua's ATI Law, Art. 4; Panama's ATI Law, Art. 1(8); for more relating to Latin American laws, see Mendel, "The Right to Information in Latin America," elsewhere in this volume; Denmark's Act 1985, Art. 1(3); Ireland's FOIA 1997, Sec. 2 and First Schedule, para. 1(5)(c); Montenegro's Law 2005, Art. 4; Serbia's Law, Art. 3(2).

⁶⁷ Denmark's Act 1985, Art. 1(3) (entity must be "mainly" funded by government); Serbia's Law, Art. 3(2) (entity must be "wholly or predominantly" funded by a state body).

⁶⁸ Central Information Commission, *Veeresh Malik v. Department of Sports, New Delhi*, 28/11/07, Appeal No. 163/ICPB/2006.

⁶⁹ *The Registrar, Thiagarajar College of Engineering, Madurai v. The Registrar, Tamil Nadu Information Commission*, High Court of India at Madras (Justice Manikumar), Writ Petition No.1253 of 2010, decided 30 April 2013.

⁷⁰ UK Ministry of Justice, Consultation Paper on FOI Act 2000: Designation of Additional Pub. Authorities, 27 October 2007.

under contract to government agencies in the fields of health care, social care (including residential care for the elderly, infirm and children), education, public housing, the justice system (including management of prisons and other custodial care facilities, prison escort services, and electronic monitoring), transportation (including air traffic control, the railroad network and the Port of London Authority), private security firms, self-regulatory bodies (including the Press Complaints Council, Solicitors Regulatory Authority, Advertising Standards Association), and standard-setting bodies.⁷¹

The United States FOI Act expressly applies to any “government corporation” or “government controlled corporation,”⁷² but does *not* apply to private entities and any bodies that “are neither chartered by the federal government [n]or controlled by it.”⁷³ Even where the government contracts out government functions, the FOI Act does not apply to the contractor and the government has no responsibility to take possession of the information in order to make it available.⁷⁴ This is a major loophole in US law. However, the FOI Act⁷⁵ and other laws⁷⁶ do at least require government agencies to disclose certain information submitted to them by private entities.

⁷¹ Campaign for FOI, FOI Act 2000: Designation of Additional Public Authorities, 3 March 2008.

⁷² 5 U.S.C. § 552(f)(1).

⁷³ *Forsham v. Harris*, 445 U.S. 169, 179–80 (1980).

⁷⁴ *Ibid.*

⁷⁵ 5 U.S.C. §552(f)(2)(B)). Information prepared by the private sector and submitted to the government, whether voluntarily or pursuant to other laws, is fully subject to FOIA (including exceptions). FOIA amendments passed in 2007 extended the Act’s coverage to information “maintained for an agency by an entity under Government contract, for the purposes of records management.” In addition, records that are created or maintained by a private contractor under contract with an agency may be considered “agency records” under the control of the contracting agency in certain circumstances, depending on the degree of government control over those records.

⁷⁶ Some laws require the government to collect information for the express purpose of making it available to the public. Examples include campaign finance information and the Environmental Protection Agency’s toxic release inventory. Other laws require private entities to provide information to the government—such as chemical facility worst-case scenario reporting—to which the public has limited availability. Private entities are required to make some types of information available *to the public* as well as the government. This category includes pharmaceutical product package inserts, and some tax forms and annual reports. For instance, nonprofit organizations are required to publish their annual Tax Form 990, which includes the salaries of top paid board and staff members and other major expenditure and income lines. Private companies are required to make public a great deal of consumer information—such as privacy policies, credit disclosure terms, food labeling and health warnings—even though not required to submit the information to government. Corporations are required to make public, in their tax forms and annual reports, audited financial data, compensation and benefits for top officials, and any events that may have a material effect on the value of their shares.

C. The Proposed Standard: Private Entities That Perform Public Functions or Receive Public Funds

Private entities that perform public functions (including by exercising administrative authority or providing public services) or receive non-trivial amounts of public funds or benefits should be covered by RTI laws, at least as to those functions, funds or benefits. What constitutes “public functions” or “non-trivial” funds should be clearly defined in law. Applying RTI laws to such entities makes good sense. The approach (a) is rational, given that the public should be entitled to obtain information from, and hold accountable, entities that perform public functions or receive public funds, (b) is fair, applying a common test across the board; and (c) promotes certainty, so long as terms such as “public functions” and “non-trivial” are clearly defined. In contrast, laws that are applicable to an enumerated list of entities comply with the interest in certainty but lack fairness.

The above standard meets the four main objections raised concerning the application of RTI laws to private entities. First, if disclosure obligations are too onerous, private entities could be discouraged from accepting public funds or performing public functions even though their work well serves the public interest. This objection is substantially met if disclosure obligations are limited to the public funds or services. A second objection is the possible chilling effect on investors, donors or members. This is a particular concern regarding nonprofit advocacy organizations and labor unions. For instance, the laws of at least five Latin American countries (Brazil, Ecuador, Guatemala, Honduras, and Panama) expressly apply to nongovernmental organizations that receive public funds or benefits, and Honduras’ law expressly applies to unions that receive public benefits. While such organizations should have no problem regarding disclosure of their budgets, including officer salaries, they could well have legitimate concerns that disclosing names of members or donors could expose those persons, or others associated with the entity, to harassment. Such concerns may, in some country contexts, be substantially addressed by limiting the scope of coverage to private businesses. A more consistent approach would be to include an exception to allow the withholding of information where disclosure could subject individuals to harassment, for instance, where there had been a history of such harassment.

Third, businesses often complain that transparency requirements introduce an unacceptable element of unpredictability, irrationality and/or unfairness. For instance, Armenia’s RTI law applies to “private organizations that have a monopoly or leading role in the goods market.”⁷⁷ What constitutes a “leading role”? And, if the phrase is to apply at all, why only to the goods market? Why not also to services? Making an RTI law applicable only to the public funds received or to private entities that receive *substantial* pub-

⁷⁷ Armenia’s Law, Art. 3.

lic funding (clearly defined, for instance, as more than 50% of their operating expenses, or over a certain absolute amount, or receipt of public assets of a specified value or at a specified percentage of value or amount below fair market value), responds to public and business interests in rationality, certainty and fairness.

Fourth, businesses often complain that transparency obligations impose unfair competitive disadvantages vis-à-vis non-obliged competitors. One response is that government funding gives entities a substantial competitive advantage; this is certainly true regarding SOEs, which, generally, are fully or largely indemnified by the government. A second response is that studies have shown that, in fact, transparency requirements do not place entities at a comparative disadvantage, or at least not a significant one.⁷⁸

D. Private Bodies that Hold Information Necessary to Protect a Right

One of the most important outstanding questions is the extent to which the right to information should apply to private bodies, regardless of whether they perform public functions or receive public funds, if a person needs the information to exercise or protect an important right. The justification for such an approach is three-fold. First, private bodies, especially large companies, have the potential to impact significantly the enjoyment of important rights. Second, around the world, governments increasingly are contracting out services to private entities, often precisely in order to evade government regulation and public scrutiny. Third, the concept of “public functions and services,” even if generously defined, does not cover many “public-like” functions and services exercised by increasingly powerful private entities, such as Internet providers, arms manufacturers, and exploiters of natural resources.

The Model Law for Africa, the African Commission’s Declaration of Principles on Freedom of Expression, access to information laws of South Africa and Rwanda, and the Constitutions of Kenya and South Africa all extend their coverage to private entities that hold information needed by persons to exercise or protect their rights.⁷⁹ This approach has not, however,

⁷⁸ See, e.g., the 1990 report of New Zealand’s Select Committee on review of the impact of the Official Information Act and Ombudsmen Act on SOEs.

⁷⁹ *Supra* note 19. South Africa’s Constitution, Sec. 32, and Promotion of Access to Information Act (PAIA) 2000, SS. 1, 9(a) and 12, and Kenya’s 2010 Constitution, Sec. 35(1) guarantee a right of access to any information that is held by any “person” and that is “required” for the exercise or protection of any right. Principle IV(2) of the Declaration of Principles, *supra* note 8, states that “[E]veryone has the right to access information held by private bodies which is necessary for the exercise or protection of any right.” Rwanda’s 2013 law, Art. 2(4), applies to a private body that holds information relevant to “rights and freedoms of people.”

been adopted outside of Africa. Even pro-transparency experts are concerned that the approach while granting the right (at least in theory) to some important information, could result in demands for disclosure of information from advocacy and other non-governmental groups that could vitiate their ability to function. They note that it is wiser to advocate for laws that, at the least, will not increase the opportunities for harm. One partial solution would be to limit the right of access to information needed to exercise or protect an important right to business enterprises.

VII. Conclusion

The right of access to information has expanded rapidly since the collapse of the Berlin Wall. Not only has the number of countries with national laws increased from 13 in 1989 to 99 in 2014, the range of bodies covered by the laws has expanded, so that coverage in many countries now extends to the most sensitive executive offices (including advisors to the head of government, and the security and intelligence agencies); judicial and legislative bodies concerning their judicial and legislative information; as well as private bodies that perform public functions or receive substantial public funds.

The area of least consensus concerns application of right to information laws to entities that receive trivial or no public funds. The argument for such coverage is that in many, if not most, countries large corporate entities impact most people's daily lives at least as much as government. On the other hand, extension of disclosure obligations to private entities is a two-edged sword that could harm not-for-profit entities, and especially those that aim to hold powerful interests accountable.

Robust and effective government regulation of companies should, in theory, be able to protect the rights of individuals and the broader public to access information they need to protect important rights and interests. However, economic and other crises have demonstrated the inability and /or unwillingness of governments to do so. The trend of laws, at least in democracies, to provide greater public access to information held by private entities that perform public functions or receive non-trivial amounts of public funds aims to respond to the inevitable weaknesses of government regulation while strengthening the potential of public scrutiny to promote accountability and provide effective remedies for excesses by the powerful - be they public, private or something in-between.

The Rabat Plan of Action: A Critical Turning Point in International Law on “Hate Speech”

SEJAL PARMAR¹

I. Introduction

This chapter considers the “Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred That Constitutes Incitement to Discrimination, Hostility or Violence” (RPA) as a critical “turning point” in the development of international law on so-called “hate speech,” particularly under Article 20, para. 2, of the International Covenant on Civil and Political Rights (ICCPR). This provision, one of the most controversial in any human rights treaty, requires the prohibition of “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”² Adopted by experts on 5 October 2012 in Rabat, Morocco, the RPA brings together the conclusions and recommendations of a series of workshops organized by the Office of the High Commissioner for Human Rights (OHCHR) in 2011.³ Since its adoption, the RPA has gained some attention from within and outside the United Nations (UN) human rights system. Specifically, it has been launched and publicized by the

¹ A shorter version of this article appeared in the *European Human Rights Law Review* in early 2014. See Sejal Parmar, “The Rabat Plan of Action: A Global Blueprint for Combating ‘Hate Speech’” (2014) 1 *European Human Rights Law Review* 21 – 31.

² The RPA was later contained as the Appendix to an Addendum to an annual report of the High Commissioner for Human Rights (Appendix in the Annual Report of the United Nations High Commissioner for Human Rights, A/HRC/22/17/Add.4, 11 January 2013).

³ *Ibid.*, paras. 17 and 13 of the Annual Report.

OHCHR⁴, acknowledged and supported by UN Special Rapporteurs in their reports,⁵ referenced in resolutions of the Human Rights Council and General Assembly,⁶ relied upon by the Committee on the Elimination of Racial Discrimination,⁷ and been publicly endorsed by ARTICLE 19, the leading international NGO on freedom of expression which played a vital role in its drafting.⁸ At the same time, the RPA has hitherto received remarkably little attention from other key actors, particularly states, the primary subjects of its recommendations, as well as the media.⁹

⁴ Navi Pillay, "Freedom of Expression and Incitement to Hatred in the Context of International Human Rights Law," lecture at the London School of Economics, 15 February 2013, transcript available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13018&LangID=E>; OHCHR press release on the launch of the RPA, "Between Free Speech and Hate Speech: The Rabat Plan of Action, a Practical Tool to Combat Incitement to Hatred," 21 February 2013. See also seminar on "Preventing Incitement to Atrocity Crimes: Policy Options for Action," 21–22 February 2013, Geneva, Switzerland.

⁵ Report of the Special Rapporteur on Freedom of Religion, Heiner Bielefeldt, A/HRC/22/51, 24 December 2012, para. 63; Report of the Special Rapporteur on Freedom of Opinion and Expression, Frank La Rue, A/HRC/23/, 17 April 2013, para. 8; Report of the Special Rapporteur on Freedom of Opinion and Expression, Frank La Rue, A/67/357, 7 September 2012 (presented to the General Assembly before the adoption of the RPA but discussing the OHCHR workshops); Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mutuma Ruteere, A/HRC/23/56, 2 April 2013, para. 9.

⁶ Human Rights Council Resolution 22/31 of 22 March 2013 on combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief, A/HRC/RES/22/31, 15 April 2013, para. 4; General Assembly Resolution of 20 December 2012 on combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against persons, based on religion or belief, A/RES/67/178, 28 March 2013.

⁷ Committee on the Elimination of Racial Discrimination, General Recommendation No. 35 on "Combating racist hate speech," 26 September 2013 CERD/C/GC/35, paras 15, 16, 29 and 35; Communication No. 48/2010, *TBB Turkish Union v. Germany*, Committee on the Elimination of All Forms of Racial Discrimination, Decision of 26 February 2013, Individual Opinion of Committee Member Mr. Carlos Manuel Vazquez (dissenting), 4 April 2013, footnotes 4, 7, and 11.

⁸ ARTICLE 19, "ARTICLE 19 Welcomes the Rabat Plan of Action on the Prohibition of Incitement and Calls for Its Full Implementation," statement, 16 November 2012.

⁹ The RPA has been the subject of side events at the Human Rights Council and the OSCE. ARTICLE 19 organized a side event entitled "The Prohibition of Incitement to Hatred and Beyond: Towards the Implementation of the Rabat Plan of Action" on 7 June 2013 at the 23rd session of the Human Rights Council. See <http://www.article19.org/resources.php/resource/3768/en/unhrc-event-incitement-to-hatred-%284th-june%29>. Sejal Parmar and Péter Molnár of the Central European University

This chapter challenges the paucity of attention so far paid by such actors by arguing that the RPA is a highly significant, if not critical, “turning point” in the understanding and implementation of international law on freedom of expression and incitement to hatred. The RPA deserves a higher profile than it has attracted to date and should be taken seriously by all those whom it addresses, particularly state actors. The fundamental claim of this chapter is that, on the basis of its strengths and notwithstanding its shortfalls, states and non-state actors, particularly media and civil society organizations, should rally behind the RPA as a legitimate and credible framework for responding to diverse challenges of hate speech around the world. Though it was not concluded by states, but rather by “experts,” the RPA should be viewed as the “state of the art” interpretation of the obligations flowing from the prohibition of incitement to national, racial or religious hatred under Article 20 of the ICCPR. As a framework for action by state and also non-state actors, the RPA draws its legitimacy and credibility from both the process that led to its drafting (the “input”) as well as its substantive content (the “output”).¹⁰ This chapter also argues that the significance of the RPA derives from its place in the ongoing story of freedom of expression at the UN human rights bodies, before and since the achievement of Resolution 16/18 of the Human Rights Council which ended over a decade of resolutions on “combating defamation of religions.”

II. The Significance of the Rabat Plan of Action

The RPA is significant because of the factors explained in this part. *First*, the RPA should be viewed as part of the continuing narrative of the UN human rights system on the protection of freedom of expression in its relationship with religious equality, as well as religious feelings. *Second*, the process that

convened a side event on “Understanding and Implementing the Obligation to Prohibit Incitement in the OSCE: The Implications of the Rabat Plan of Action for the Region” on 24 September 2013 at the OSCE Human Dimension Implementation Meeting in Warsaw. See <http://legal.ceu.hu/news/2013-10-08/%E2%80%9CUnderstanding-and-implementing-the-obligation-to-prohibit-incitement%E2%80%9D-professor-par>.

¹⁰ For Franck, legitimacy was “a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process” (Thomas Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990), 24). On the legitimacy of UN human rights treaty bodies, see Helen Keller and Geir Ulfstein, *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge: Cambridge University Press, 2012).

led to its adoption was transparent and involved the participation of high-level experts from the UN human rights system and NGOs. *Third*, in terms of substance, the RPA provides the clearest guidance to states for expressions that should be criminalized, in addition to providing legal and policy recommendations with respect to incitement for a range of state and non-state actors. It is argued that the second and third factors, namely those concerning the RPA's input and output legitimacy, are reasons for the text's future influence as a key instrument in the understanding of human rights norms and the basis for state practice on the particular issue of incitement to hatred.¹¹

At the outset it is emphasized that the RPA has a number of shortfalls which will not be examined due to space constraints. The most pressing concerns are: the lack of a comprehensive approach to incitement to hatred, which only covers grounds covered by Article 20(2) of the ICCPR and not other grounds of discrimination including sex or sexual orientation; the way in which the RPA skims over the divergences between Article 20(2) of the ICCPR and Article 4 of the International Convention on the Elimination of Racial Discrimination (ICERD) and does not address the tensions between the two provisions; and arguably a lack of concentration on Internet-based forms of hate speech, which are increasingly common, but which appear to confound states in terms of developing appropriate responses. Notwithstanding these weaknesses, the RPA remains a highly significant framework for addressing incitement to hatred and the remainder of this chapter explains why.

A. Origins and Contextual Significance

The roots of the RPA are complex and entwined with those of other processes in the UN human rights system. At a superficial level, the RPA may be seen as part of the UN human rights system's evolving approach to anti-racism given that its origins lie in the 2009 Durban Review Conference held in Geneva¹² and further back in the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban.¹³ The outcome document of the Durban Review Conference expressly acknowledges a proposal by the OHCHR to organize

¹¹ On General Comments as the basis for state practice, see Christine Chinkin, "Sources," in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran, eds., *International Human Rights Law* (Oxford: Oxford University Press, 2010), 109–10.

¹² Durban Review Conference, 20–24 April 2009, Outcome Document, http://www.un.org/durbanreview2009/pdf/Durban_Review_outcome_document_En.pdf.

¹³ Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 August to 8 September 2001, A/CONE.189/12.

in cooperation with regional stakeholders in all parts of the world, ... a series of expert workshops to attain a better understanding of the legislative patterns, judicial practices and national policies in the different regions of the world with regard to the concept of incitement to hatred, in order to assess the level of implementation of the prohibition of incitement to hatred, as stipulated in article 20 of the ICCPR.¹⁴

The proposal of these workshops in 2009 actually built on an OHCHR-organized expert seminar on the links between Articles 19 and 20 of the ICCPR held in October 2008.¹⁵ Yet the RPA's focus on incitement to hatred is linked with long-standing and ongoing debates within the UN human rights bodies over the protection of freedom of expression, particularly speech insulting to religious beliefs, on which there have been a number of important advances over recent years. The RPA could be viewed as the latest and highly significant development in the story of freedom of expression at the UN in recent years, which has seen the decline and demise in 2010 of resolutions on combating "defamation of religions,"¹⁶ a concept that is incompatible with international human rights law on freedom of expression,¹⁷ alongside a re-focusing on the term "incitement," a concept that is firmly established in international law, specifically Article 20, para. 2, of the ICCPR.

A defining stage in this shift was the complete omission of "defamation of religions" from the Durban Review Conference's outcome document—a factor which human rights NGOs claimed as evidence for the declining support among states for resolutions on the subject and used to make the case against their further adoption.¹⁸ Two years after the Durban Review

¹⁴ Para. 134 of the Durban Review Conference outcome document; Report of the Durban Review Conference, Geneva, 20–24 April 2009, A/CONF.211/8.

¹⁵ See the Report of the High Commissioner for Human Rights, Expert Seminar on the Links between Articles 19 and 20 of the International Covenant on Civil and Political Rights: "Freedom of Expression and Advocacy of Religious Hatred That Constitutes Incitement to Discrimination, Hostility or Violence," (Geneva, 2–3 October 2008), 16 January 2009, A/HRC/10/31/Add.3. For expert papers, see also <http://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/2008Seminar/Pages/ExpertSeminar2008.aspx>.

¹⁶ Sejal Parmar, "Uprooting 'Defamation of Religions' and the Emergence of a New Approach to Freedom of Expression at the United Nations," in Tarlach McGonagle and Yvonne Donders, eds., *The United Nations and Freedom of Expression and Information: Critical Perspectives* (forthcoming).

¹⁷ Sejal Parmar, "The Challenge of 'Defamation of Religions' to Freedom of Expression and the International Human Rights System," *European Human Rights Law Review* 3 (2009): 353–75.

¹⁸ ARTICLE 19, "ARTICLE 19 and CIHRS Welcome Final Agreement on the Final Outcome Document of the Durban Review Conference," press release, 23 April 2009.

Conference, at the 16th session of the Human Rights Council in March 2011, the Organisation of Islamic Cooperation (OIC) refrained from presenting any resolution on combating “defamation of religions.” Instead, the Human Rights Council adopted by consensus Resolution 16/18 on “combating intolerance, negative stereotyping and stigmatization of, and discrimination, *incitement* to violence, and violence against persons based on religion or belief” (emphasis added). This breakthrough resolution, which encompasses the term “incitement,” was followed in 2012 and 2013 by similar resolutions at the Human Rights Council and General Assembly.¹⁹ The Human Rights Committee’s General Comment No. 34 on Article 19 of the ICCPR, which was finalized in July 2011, further entrenched the rejection of “defamation of religions” by stating “[p]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, para. 2, of the Covenant.”²⁰ Thus, the content of the RPA on the meaning and implications of Article 20, para. 2, of the ICCPR speaks to the work of various UN Charter-based and treaty-based human rights bodies, which have been referencing the term, while at the same time being “crucial in preventing the ‘transmogrification’ of the discourse of defamation of religions into one of incitement.”²¹

The RPA resonates particularly with the so-called “Istanbul Process” on the operationalization of Resolution 16/18, which seeks to combat, among other

¹⁹ This resolution was subsequently adopted by members of the Human Rights Council on the basis of consensus (i.e., without a vote). Human Rights Council Resolution 16/18 of 24 March 2011 has since been consolidated through similar resolutions adopted by the Human Rights Council in subsequent years—through Resolution 19/25 of 23 March 2012 and Resolution 22/31 of 22 March 2013—and the Third Committee of the General Assembly—through Resolution 66/167 of 19 December 2011 and Resolution 67/178 of 20 December 2012.

²⁰ Human Rights Committee, General Comment No. 34, CCPR/C/GC/34, 11 September 2011, para. 48. For commentary on the general comment, see Michael O’Flaherty, “Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment No. 34,” *Human Rights Law Review* 12.4 (2012): 627–54. In August 2012, the Committee on the Elimination of Racial Discrimination held a “day of thematic discussion” to reflect upon the possibility of preparing a general recommendation on the subject of racist hate speech on the basis of Article 4(a) of the International Convention on the Elimination of Racial Discrimination (ICERD); Committee on the Elimination of All Forms of Racial Discrimination, Summary Record of the 2196th meeting, Day of Thematic Discussion on Racist Hate Speech, 4 September 2012, CERD/C/SR.2196.

²¹ Parmar, “Uprooting ‘Defamation of Religions,’” *supra* note 16, quoting Robert C. Blitt, “The Bottom-up Journey of ‘Defamation of Religion’ from Muslim States to the United Nations: A Case Study of the Migration of Anti-Constitutional Ideas,” *Special Issue on Human Rights: New Possibilities/New Problems, Studies in Law, Politics and Society* 36 (2011): 121–211.

things, “incitement to violence” against person based on religion or belief.²² The Istanbul Process was launched in Turkey in July 2011,²³ and has involved further meetings in Washington, DC, in December 2011,²⁴ London in December 2012,²⁵ and Geneva in June 2013.²⁶ At the time of September 2013, further meetings of the Istanbul Process were due to be held in Qatar and Chile. Although both the RPA and the Istanbul Process have overlapping coverage, it is clear that the latter also covers a broader range of discriminatory behavior, namely “intolerance, negative stereotyping and stigmatization of, and discrimination ... and violence against, persons based on religion or belief.” The Istanbul Process is supposed to bring together experts at a series of meetings, but unlike the RPA process that was characterized by the OHCHR’s leadership and the central role of experts and participation of a broad range of stakeholders as discussed in the next section, it is fundamentally an intergovernmental, state-driven process with very limited scope for participation of NGOs. Furthermore, unlike the RPA process, the Istanbul Process is closed and nontransparent in nature, which makes proper external analysis and scrutiny impossible: to date, there is no dedicated website, documents and statements prepared for and emerging from the meetings are rarely available and released on an ad hoc basis by participating states.²⁷

²² The Istanbul Process is confusingly entitled as there is another prominent “Istanbul Process” involving OIC states. The declaration of the “Istanbul Process on Regional Security and Cooperation for a Secure and Stable Afghanistan” was adopted on 2 November 2011 at the Istanbul Conference on Afghanistan by “Heart of Asia” countries consisting of Afghanistan, China, India, Iran, Kazakhstan, the Kyrgyz Republic, Pakistan, the Russian Federation, Saudi Arabia, the Republic of Tajikistan, Turkey, Turkmenistan, and the United Arab Emirates.

²³ Remarks of Hillary Rodham Clinton at Organisation of Islamic Conference High Level Meeting on Combating Religious Intolerance, Center for Islamic Arts and History, Istanbul, Turkey, 15 July 2011, <http://www.state.gov/secretary/rm/2011/07/168636.htm>.

²⁴ US Department of State, *Report of the United States on the First Meeting of Experts to Promote the Implementation of United Nations Human Rights Council Resolution 16/18*, December 2011, <http://www.humanrights.gov/wp-content/uploads/2012/04/1618FirstMeetingReport.pdf>.

²⁵ Wilton Park Conference Report, “Combating Intolerance and Promoting Freedom of Religion or Belief for All: Working on UN Human Rights Council Resolution 16/18,” 3–5 December 2012, WP 1187, February 2013.

²⁶ Statement by Ambassador Michael G. Kozak, Acting Principal Deputy Assistant Secretary for Democracy, Human Rights and Labor, at the Third International Expert Meeting on the Istanbul Process for Combating Intolerance, Discrimination and Incitement to Hatred and/or Violence on the Basis of Religion or Belief, the Follow-up of Implementation of HRC Resolution 16/18, Geneva, 21 June 2013, <http://geneva.usmission.gov/2013/07/09/statement-by-the-u-s-on-the-way-forward-with-the-istanbul-process-2/>.

²⁷ An example of a statement that was readily available was that which was delivered by Michael G. Kozak, *supra* note 26.

The Istanbul Process also lacks an institutional connection with the UN human rights system, despite its grounding in Human Rights Council Resolution 16/18 and endorsement by General Assembly Resolution 67/178 of 20 December 2012 and Human Rights Council 22/31 of 22 March 2013. Moreover, the apparent consensus forged by states around Resolution 16/18, its successors and the Istanbul Process is a fragile one. Tensions have emerged on the OIC's proposals for yet more discussion on the subject of incitement and Article 20 of the ICCPR and for the establishment of an "observatory" to monitor violations of freedom of religion or belief as a means to implement the action plan under Resolution 16/18.²⁸ The US strongly resists the proposal of an observatory. The US Acting Principal Deputy Assistant Secretary for Democracy, Human Rights and Labor, Michael G. Kozak, stated at the June 2013 meeting of the Istanbul Process held in Geneva: "[t]o call for an observatory when members are not meeting the existing reporting requirements makes little sense."²⁹

From the perspective of the RPA however, the Istanbul Process may be seen as an alternative, and even rival, mechanism for the interpretation of international legal obligations on incitement to hatred. Any initiative for further discussions on the term incitement as part of the Istanbul Process, if it is agreed by states, should consolidate the conclusions and recommendations of the RPA, rather than serve to undermine that document. Thus, the short-term prospects of the RPA may depend in large part on the preparedness of states also engaged in the Istanbul Process to acknowledge its relevance on the overlapping issues of concern and to refrain from beginning another conversation on the meaning of incitement and Article 20 of the ICCPR.

B. Input Legitimacy

The OHCHR-led workshops leading to the adoption of the RPA were characterized by their regional focus and the participation of a range of experts, actors from the UN human rights system, NGOs and other stakeholders. These factors arguably enhance the legitimacy of the RPA as guidance on international law on the prohibition of incitement to national, racial or religious hatred, despite the minor role allocated to states as stakeholders in the process. Fifty-five experts, who were chosen on the basis of consultations for

²⁸ The OIC proposal for an observatory was discussed at the conference held in London in December 2012. See Wilton Park Conference Report, *supra* note 25. Interestingly, the subsequent Human Rights Council Resolution 22/31 of 22 March 2013 mentions "follow-up measures for further improvement of the implementation" of the action plan, but does not actually indicate an observatory. See A/HRC/RES/22/31, para. 10.

²⁹ *Supra* note 27.

their significant expertise and experience, particularly in relevant areas of law and policy on free speech and equality, presented papers at regional workshops held in Vienna, Nairobi, Bangkok and Santiago through 2011.³⁰ Another ten experts participated at the final workshop in Rabat, Morocco, on 4 and 5 October 2012.³¹

Each of the four regional workshops followed a similar structure and included the following: a presentation of a regional study of major trends in legislation, jurisprudence and policy relating to the prohibition of incitement³²; joint submissions of the Special Rapporteurs on freedom of opinion and expression, racism, racial discrimination and related intolerance and freedom of religion or belief³³; expert papers by members of relevant treaty bodies, specifically the Human Rights Committee and the Committee on the Elimination of Racial Discrimination; papers by leading academics³⁴; presen-

³⁰ The regional workshops that were organized throughout 2011 took place in Vienna on 9–10 February (for the European region), in Nairobi on 6–7 April (for the African region), in Bangkok on 6–7 July (for the Asia-Pacific region) and in Santiago on 12–13 October (for the Americas region).

³¹ The following individuals attended the Rabat workshop as expert panelists: Mr. Frank La Rue, Special Rapporteur Freedom of Expression and Opinion; Mr. Heiner Bielefeldt, Special Rapporteur Freedom of Religion or Belief; Mr. Mutuma Ruteere, Special Rapporteur Racism, Racial Discrimination, Xenophobia and Related Intolerance; Mr. Michael O’Flaherty, member of the Human Rights Committee; Mr. Koku Dieudonné Ewomsan, Member of the Committee on the Elimination of Racial Discrimination; Mr. Louis-Léon Christians, moderator of the expert workshop for Europe; Mr. Doudou Diène, moderator of the expert workshop for Africa; Mr. Vitit Muntarbhorn, moderator of the expert workshop for Asia and the Pacific; Mr. Eduardo Bertoni, moderator of the expert workshop for the Americas; Ms. Agnès Callamard, Executive Director of ARTICLE 19.

³² Professor Louis-Léon Christians undertook the study for the workshop on Europe in Vienna on 9 and 10 February 2011; Mr. Doudou Diène undertook the study for the workshop on Africa in Nairobi on 6 and 7 April 2011; Professor Vitit Muntarbhorn undertook the study for the workshop on Asia in Bangkok on 6 and 7 July 2011; and Mr. Eduardo Bertoni undertook the study for the workshop on the Americas in Santiago on 12 and 13 October 2011.

³³ The three UN mandate holders welcomed “the fact that the debate seems to be shifting to the concept of ‘incitement to national, racial or religious hatred’” and cautioned “against confusion between a racist statement and an act of ‘defamation of religion.’” See joint submission by Mr. Heiner Bielefeldt, Special Rapporteur on Freedom of Religion or Belief, Mr. Frank La Rue, Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, and Mr. Githu Muigai, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, OHCHR expert workshop on Europe, 9–10 February 2011, Vienna.

³⁴ Besides Special Rapporteurs and members of treaty bodies holding academic positions, there were other academic participants to the workshops, including notably Dr. Natan Lerner (Bangkok workshop) and Dr. Nazila Ghanea (Vienna workshop).

tations and papers by representatives of NGOs, including most prominently ARTICLE 19, as well as Human Rights First, the Minority Rights Group, and the Equal Rights Trust.³⁵ In addition, the OHCHR received numerous other written contributions from: stakeholders, including from 31 states as diverse as Algeria and the United States; 11 other NGOs, such as Baha'i International and the Jacob Blaustein Institute; and other institutions and individuals, including the European Union's Fundamental Rights Agency, the Northern Ireland Human Rights Commission, the United Nations High Commissioner for Refugees (UNHCR) and Professor Susan Benesch, Consultant to UN Special Advisor on the Prevention of Genocide Dr. Francis Deng. The number and diversity of papers and submissions for the regional workshops was noted to have generated a "wealth of information as well as a number of practical examples."³⁶ At the final meeting at Rabat, the findings of the workshops were comparatively analyzed and possible action and next steps were identified.³⁷

The OHCHR was also evidently committed to ensuring the openness and transparency of the process and reaching out to actors with most expertise in international human rights law and regional trends in law and policy on incitement (the experts, Special Procedures of the Human Rights Council), as well as representatives of those who had most at stake from the discussions (NGOs). Written contributions by these experts were made available on the OHCHR website, as were all other written contributions submitted by states, NGOs and other stakeholders. For each workshop, the OHCHR produced a detailed report on the deliberations during the meetings and these were also made available on the OHCHR website.³⁸ Thus, it was and remains possible for the public to examine and trace the nature of the discussions in the process leading up to the adoption of the RPA. In this way, the RPA process stands in striking contrast with the closed and intergovernmental Istanbul Process.³⁹

The leading role of UN experts and bodies was viewed as especially "crucial ... in guiding States in their implementation of provisions of human rights law on incitement to hatred" and "thereby contributing to the progres-

³⁵ See the papers of ARTICLE 19 at all four workshops (presented by Agnès Callamard in Vienna, Henry Maina in Nairobi, Amy Sim in Bangkok, and Paula Martins in Santiago), of Minority Rights Group (presented by Mark Lattimer) and Equal Rights Trust (presented by Dimitrina Petrova) in Vienna, and Human Rights First (presented by Tad Stahnke) in Santiago, <http://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/ExpertsPapers.aspx>.

³⁶ RPA, para. 3, *supra* note 2.

³⁷ RPA, para. 3, *supra* note 2.

³⁸ The vast majority of experts presented written papers. See <http://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/ExpertsPapers.aspx>.

³⁹ Human Rights Council Resolution 16/18 of 24 March 2011, A/HRC/RES/16/18.

sive development of international law and defusing political tensions.”⁴⁰ Partly as a consequence of the central role of actors from within the UN human rights system as well as international NGOs, the RPA is strongly rooted in international law. The RPA’s text expressly draws on treaty provisions as well as their authoritative interpretations by treaty bodies, namely General Comment No. 34 of the Human Rights Committee⁴¹ and General Recommendation No. 15 of the Committee on the Elimination of Racial Discrimination.⁴² This participation of the treaty bodies in a deliberative process, the apparent adherence to provisions of international law and their authoritative interpretation by treaty bodies, combined with the fact that RPA is addressed to all states suggests the RPA might be considered as a “species” of international soft law, even though the text is not and cannot be considered international treaty law or a General Comment on Article 20 of the ICCPR.⁴³ In any event, the nature of the process as well as the expertise and status of key expert participants, particularly the Human Rights Committee, is a key process-based argument for the RPA’s legitimacy.

Another important process-based factor enhancing the legitimacy of the RPA is the integral role played by NGOs, particularly the international NGO ARTICLE 19.⁴⁴ Indeed, the text heavily reflects the papers presented by ARTICLE 19 representatives at the OHCHR workshops, in particular the six-part “threshold test” that should be applied when assessing whether a particular form of expression reaches the level prohibited under Article 20, para. 2, of the ICCPR.⁴⁵ ARTICLE 19’s consolidated position on incitement to discrimination, hostility or violence was the subject of a policy document that was published

⁴⁰ Supra note 2, para. 8, of the introduction of the RPA.

⁴¹ See RPA, paras. 8, 17 and 23, supra note 2.

⁴² See RPA, para. 23, supra note 2.

⁴³ Oberleitner indicates that the precise legal nature of General Comments is “ambiguous and lies between authoritative interpretations of treaty provisions and advisory opinions” (Gerd Oberleitner, *Global Human Rights Institutions* [Cambridge: Polity, 2007], 100–101).

⁴⁴ Zoe Pearson, “NGO Involvement in International Governance and Policy: Sources of Legitimacy (Publication Review),” *European Journal of International Law* 20.4 (2009): 1289–97.

⁴⁵ See, most notably, Agnès Callamard, Barbora Bukovska, and Sejal Parmar, “Towards an Interpretation of Article 20 of the ICCPR: Thresholds for the Prohibition of Incitement to Hatred,” *A Study Prepared for the Regional Expert Meeting on Article 20, Organized by the Office of the High Commissioner for Human Rights, Vienna, February 8-9, 2010*, <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP7Callamard.pdf>. ARTICLE 19’s policy brief was finalized on the basis of the comments received during the workshops and published in December 2012. See ARTICLE 19, *Prohibiting Incitement to Discrimination, Hostility or Violence: Policy Brief* (December 2012), <http://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf>.

shortly after the adoption of the RPA.⁴⁶ The RPA also expressly draws on the Camden Principles on Freedom of Expression and Equality, a set of principles developed by ARTICLE 19 on the basis of multi-stakeholder discussions in 2008.⁴⁷ ARTICLE 19's participation was essential in shaping the final outcome document. Indeed, it exceeded the roles played by traditional actors, namely states in the UN Charter based human rights bodies (i.e., the General Assembly and the Human Rights Council), who have considered the issue of incitement since Human Rights Council Resolution 16/18.⁴⁸

C. Output Legitimacy

The RPA's substantive value stems from a number of its characteristics. *First*, the RPA, and the OHCHR's introduction, clearly identifies both the different dimensions of the mischief of incitement to national, racial or religious hatred across the world and the deficiencies of legal, judicial and policy approaches in response. While it does not go into detail, the RPA recognizes that "many

⁴⁶ See ARTICLE 19, "Policy Brief," *ibid.*

⁴⁷ See RPA, paras. 18 (footnote), 21 and 58 of the Rabat Plan of Action, *supra* note 2. The Camden Principles on Freedom of Expression and Equality are a set of international standards which were developed on the basis of discussions involving high level experts on freedom of expression from the UN, regional organizations, civil society and academia. These experts included the UN Special Rapporteurs on freedom of opinion and expression and on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. The development of the principles was facilitated by ARTICLE 19. See the Camden Principles on Freedom of Expression and Equality, April 2009, <http://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>. The Camden Principles have been referred to in the following documents of UN human rights bodies: The Rabat Action Plan on the Prohibition of Incitement to National, Racial or Religious Hatred in the Report of the United Nations High Commissioner for Human Rights on the Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred, 11 January 2013, A/HRC/22/17/Add.4; Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, 22 December 2011, A/HRC/19/60; Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, 10 August 2011, A/HRC/66/290.

⁴⁸ On the legal arrangements for NGOs in international law see: Anna-Karin Lindblom, *Non-Governmental Organisations in International Law* (Cambridge: Cambridge University Press, 2005); Sergey Ripinsky and Peter van den Bossche, *NGO Involvement in International Organisations* (London: British Institute of International and Comparative Law, 2007); Anton Vedder, ed., *NGO Involvement in International Governance and Policy: Sources of Legitimacy* (Leiden: Martinus Nijhoff Publishers, 2007); Pierre-Marie Dupuy and Lisa Vierucci, eds., *NGOs in International Law: Efficiency in Flexibility?* (Cheltenham: Edward Elgar, 2008).

conflicts worldwide”⁴⁹ and “the worse of crimes” have been triggered, at least in part, by such incitement, leading to “post-electoral violence spurred by hatred along ethnic lines; incidents involving extremist groups; abusive and malicious portrayal, online or in traditional media, of certain religions and their followers.”⁵⁰ There is also an admission in the OHCHR’s introduction to RPA that freedom of expression is a right under pressure and that its “practical application and recognition are still far from universal.”⁵¹

However, the focus of the RPA is not on the problems of incitement to hatred, but rather on the problems associated with the responses and recommendations to remedy them. On the basis of the regional surveys presented at the OHCHR workshops (the kind of which had not been achieved before), the RPA presents a very negative global assessment of legal frameworks, jurisprudence and policies against incitement to hatred. There is great variability of anti-incitement laws around the world in terms of their scope and application. Such laws, where they exist at all, are frequently “heterogeneous, at times excessively narrow or vague,”⁵² reliant on “variable terminology” which is often at odds with Article 20 of the ICCPR or excessively broad, thus “[opening] the door for arbitrary application of the laws” or the “risk of misinterpretation” of Article 20 of the ICCPR and “additional limitations to freedom of expression that are not contained” in Article 19 of the ICCPR.⁵³ This contributes to the variability in terms of the application of anti-incitement laws: on the one hand the “perpetrators of incidents, which indeed reach the threshold of Article 20 of the International Covenant on Civil and Political Rights, are not prosecuted and punished ... members of minorities are de facto persecuted, with a chilling effect on others, through the abuse of vague domestic legislation jurisprudence and policies.”⁵⁴ Thus, the RPA reveals a stark “dichotomy of (1) nonprosecution of ‘real’ incitement cases and (2) persecution of minorities under the guise of domestic incitement laws [which] seems to be pervasive.”⁵⁵ Importantly, the RPA draws particular attention to blasphemy laws as discriminatory in the protection they provide to different religions or in their application and as “counterproductive, since they may result in de facto censure of all interreligious or belief and intra-religious or belief dialogue, debate and criticism.” In terms of the courts’ system, there is “often very low recourse to judicial and quasi-judicial mechanisms in alleged cases of incitement to hatred” due to a number of factors, including the com-

⁴⁹ RPA, para. 7, *supra* note 2.

⁵⁰ RPA, para. 2, *supra* note 2.

⁵¹ Introduction to RPA, para. 5, *supra* note 2.

⁵² RPA (Context), para. 11, *supra* note 2. See also Introduction to the RPA, para. 7.

⁵³ RPA, para. 15, *supra* note 2.

⁵⁴ RPA, para. 11 (Context). See also para. 16, which considers that diversity in approaches to incitement to racial and religious hatred. See *supra* note 2.

⁵⁵ RPA, para. 11 (Context), *supra* note 2.

plete absence of or deficiencies in legislation and legal assistance available to individuals who are particularly vulnerable to incitement to hatred, a “lack of trust in the judiciary” and a lack of public awareness.⁵⁶ Given this situation, it is hardly surprising that jurisprudence on incitement to hatred is found to be “scarce and ad hoc.”⁵⁷ Finally, the RPA suggests that policy approaches toward dealing with incitement to hatred are few and far between. Although some states are said to have “adopted related policies, most of them are too general, not systematically followed up, lacking focus and deprived of proper impact assessments.”⁵⁸

Second, the RPA reinforces existing international law on incitement to hatred and freedom of expression in various ways. It is recalled that the aims of the OHCHR workshops were to examine “legislative patterns, judicial practices and ... policies” concerning the prohibition of incitement to national, racial or religious hatred around the world; produce a “comprehensive assessment of the state of implementation of this prohibition”; and also to “identify possible actions at all levels.”⁵⁹ Moreover, toward reaching these goals, the process of the RPA also “[encouraged] full respect for freedom of expression as protected by international human rights law.”⁶⁰ Through its conclusions and recommendations, the RPA fleshes out the meaning of relevant provisions of international law on incitement to hatred, particularly under Article 20(2) as well as Article 19(3) of the ICCPR, and their implications in terms of implementation by states.⁶¹ The key recommendations, particularly concerning the definition of incitement, will be considered below.

One cannot ignore the fact that, in various places, the RPA also refers to Article 4 of the International Convention on the Elimination of Racial Discrimination (ICERD), which is noted to prohibit expression deemed to be incitement to discrimination, hostility or violence under “some different conditions.”⁶² Whereas Article 20(2) of the ICCPR requires states to simply prohibit “any advocacy of national, racial or religious hatred that constitutes

⁵⁶ RPA, para. 27, *supra* note 2.

⁵⁷ RPA, para. 11 (Context), *supra* note 2. See also para. 7 of the introduction to the RPA.

⁵⁸ RPA (Context), para. 11, *supra* note 2.

⁵⁹ “Concept Paper on OHCHR’s Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred: Follow-up to the Expert Seminar on Articles 19 and 20 of the ICCPR with Regard to Freedom of Expression and Incitement to Hatred” (2011), <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/IncitementWorkshopsConceptPaper.pdf>. See also introduction to the RPA, para. 17, *supra* note 2.

⁶⁰ RPA, para. 2, *supra* note 2.

⁶¹ RPA, para. 17, *supra* note 2.

⁶² See RPA, para. 14. See also references to Article 4 of the ICERD at para. 17 and para. 13 of the introduction to the RPA, *supra* note 2.

incitement to discrimination, hostility or violence,” Article 4 ICERD requires states to undertake a broader range of steps to combat incitement, specifically “to adopt immediate and positive measures designed to eradicate all incitement to, or acts of ... discrimination,” “declare an offence punishable by law ... incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin” and ban public authorities or institutions from inciting racial discrimination. Despite their divergences, the RPA assumes that these two provisions may be reconciled.⁶³

In addition to these treaty provisions, the RPA also relies on the authoritative interpretation of international law by relevant human rights treaty bodies. The RPA specifically recommends that states should “make use of the guidance provided by international human rights expert mechanisms,” including General Comment No. 34 of the Human Rights Committee and General Recommendation No. 15 of the Committee on the Elimination of Racial Discrimination.⁶⁴ The RPA, in its discussion of legislation on incitement to hatred, quotes the entirety of paragraph 48 of the Human Rights Committee’s General Comment No. 34 on Article 19 on the issue of blasphemy and religious insult laws.⁶⁵

48. Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents

⁶³ Mendel has argued that Article 20 ICCPR and Article 4 ICERD diverge with respect to the following: (1) whether advocacy of hatred is a necessary component (it is not by the ICERD, but is by the ICCPR); (2) whether the speech in question must incite to a proscribed result or it is sufficient for it merely to fall within a category of prohibited statements (the ICERD and the ICCPR prohibit incitement to discrimination and violence, the ICCPR additionally refers to hostility and ICERD to hatred); and (3) whether a state of mind, without reference to any specific act, can serve as a proscribed result. See T. Mendel, “Study on International Standards Relating to Incitement to Genocide or Racial Hatred” prepared for the UN Special Advisor on the Prevention of Genocide, April 2006.

⁶⁴ RPA, para. 23 of the RPA, *supra* note 5.

⁶⁵ For commentary on the General Comment No. 34, see O’Flaherty, “Freedom of Expression.” Oberleitner indicates that the precise legal nature of General Comments is “ambiguous and lies between authoritative interpretations of treaty provisions and advisory opinions” (Oberleitner, *Global Human Rights Institutions*, 100–101).

over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.

By citing the entire paragraph, the RPA further bolsters the position taken in 2011 by the Human Rights Committee in relation to laws on blasphemy, religious insult and “defamation of religions”—a position taken after concerted pressure from global NGOs, notably ARTICLE 19,⁶⁶ on the committee to revise the formulation contained in earlier drafts, which appeared to leave room for blasphemy or laws prohibiting defamation of religion.⁶⁷ Yet this reference also serves to consolidate the position taken in Human Rights Council Resolution 16/18 on combating religious intolerance, referenced in the introduction of the RPA.⁶⁸ In no uncertain terms, the RPA states that states which “have blasphemy laws should repeal them, as such laws have a stifling impact on the enjoyment of freedom of religion or belief, and healthy dialogue and debate about religion.”⁶⁹

Third, the RPA offers a spectrum of strategic, legal and nonlegal responses to be undertaken by a range of state and non-state actors to ensure the proper implementation of international human rights law on incitement to hatred. The varied, comprehensive and holistic approach taken by the RPA’s scheme of recommendations means that its implementation requires a greater

⁶⁶ For example, see ARTICLE 19, “Statement on Draft General Comment No. 34 on Article 19 of the ICCPR on Freedom of Opinion and Expression upon Completion of the First Reading by the Human Rights Committee,” 31 January 2011, paras. 47–49. See also “Observations of the United States of America on the Human Rights Committee’s Draft General Comment 34: Article 19,” 5 July 2011 (on file with author).

⁶⁷ CCPR/C/GC/34/CRP.1, 31 August 2009, para. 49; CCPR/C/GC/34/CRP.2, 29 January 2010, para. 47; CCPR/C/GC/34/CRP.4, 22 October 2010, para. 50; CCPR/C/GC/34/CRP.6, 3 May 2011, para. 50. Letter from Dr. Agnès Callamard, ARTICLE 19 Executive Director, to Committee Members, 13 July 2011; Letter from Julie de Rivero, Geneva Director, Human Rights Watch, to Committee Members, 20 July 2011; Letter from Michael Bochenek, Senior Director, International Law and Policy Programme, Amnesty International, to the Chair of the Human Rights Committee, 20 July 2011 (all on file with author). In their submissions, NGOs critically referred to the consensus recently achieved on Human Rights Council Resolution 16/18 and its omission of the term “defamation of religions”. The letters from ARTICLE 19 and Human Rights Watch also referred to the statements of the UN Special Rapporteurs on freedom of opinion and expression, freedom of religion or belief and racism, racial discrimination, xenophobia and related intolerance.

⁶⁸ Introduction to the RPA, para. 13 and RPA, para. 41, *supra* note 2.

⁶⁹ Para. 25 of the Rabat Plan of Action, *supra* note 5.

level of “commitment” and concerted action from the state and other actors.⁷⁰ In relation to legislation, the RPA affirms that criminal sanctions for incitement (following the six-part threshold test) should be viewed as “last resort measures to be only applied in strictly justifiable situations.” There should also be in place “civil sanctions and remedies, ... including pecuniary and nonpecuniary damages, along with the right of correction and the right to reply” and “administrative sanctions and remedies ... including those identified and put in force by various professional and regulatory bodies.”⁷¹ Legislation on incitement to hatred should make express reference to Article 20(2) of the ICCPR and states should consider drawing on the definitions of terms such as hatred, discrimination and violence provided in the Camden Principles on Freedom of Expression and Equality.⁷² Legal responses also include “comprehensive anti-discrimination legislation that includes preventive and punitive action to effectively combat incitement to hatred.”⁷³

At the same time, the RPA acknowledges that legal measures are only “part of a large toolbox” of responses demanded by the problems of incitement to hatred. The RPA proposes a diversity of policies, practices and measures to promote “a culture of peace, tolerance and mutual respect” in society.⁷⁴ States are recommended to, among other things: “combat negative stereotypes ... and discrimination”; “promote intercultural understanding,” particularly in schools; establish human rights training programs for teachers; conduct training on incitement to hatred for the security forces, the police and indeed all “those involved in the administration of justice”; consider establishing equality bodies or enhancing the role of national human rights institutions; ensure the “systematic collection of data in relation to incitement to hatred offences”; and have in place a “public policy and regulatory framework which promote pluralism and diversity of the media, including new media.”⁷⁵

Notwithstanding their status as non-state actors, media organizations themselves have “moral and social responsibility ... in combating discrimination and promoting intercultural understanding” even though self-regulation is the best way to promote professional standards.⁷⁶ This responsibility

⁷⁰ Navi Pillay, the High Commissioner for Human Rights, stated: “[w]hat we need is proper guidance for implementing these standards, combined with a sufficient degree of political commitment on all sides of the debate.” Lecture at the London School of Economics by Ms. Navi Pillay United Nations High Commissioner for Human Rights, “Freedom of Expression and Incitement to Hatred in the Context of International Human Rights Law,” 15 February 2013.

⁷¹ RPA, para. 34, *supra* note 2.

⁷² RPA, para. 21, *supra* note 2.

⁷³ RPA, para. 26, *supra* note 2.

⁷⁴ RPA, para. 35, *supra* note 2.

⁷⁵ RPA, paras. 42–49, *supra* note 2.

⁷⁶ RPA, para. 58, *supra* note 2.

means that, among other things, the media should report in a sensitive manner; bring acts of discrimination to the attention of the public; be aware of exacerbating discrimination or negative stereotypes and avoid unnecessary references to group characteristics such as race, religion and gender; report on “different groups or communities and [give] their members the opportunity to speak and to be heard in a way that promotes a better understanding of them, while at the same time reflecting the perspectives of those groups or communities.”⁷⁷ In addition, the principle of equality should be reflected in voluntary professional codes of conduct for the media.⁷⁸ Interestingly, the RPA’s articulation of this responsibility is self-consciously “[i]n line with” Principle 9 of the Camden Principles on Freedom of Expression and Equality.

The RPA also targets other non-state actors with recommendations: NGOs, national human rights institutions and civil society organizations should “foster intercultural understanding and learning” and political parties “adopt and enforce ethical guidelines in relation to the conduct of their representatives, particularly with respect to public speech.”⁷⁹ There should be greater cooperation and coordination among UN human rights treaty bodies and special procedures, as well as cooperation with other intergovernmental organizations, such as the OSCE.⁸⁰ The focus is on the OHCHR, which should be properly resourced to support the work of relevant special procedures mechanisms, should “consider developing tools, including a compilation of best practices and elements of a model legislation on the prohibition of incitement” and should consider organizing “regular judicial colloquia” on incitement for the sharing of good practices.⁸¹

Fourth, in the section on “jurisprudence” the RPA presents a six-part threshold test for determining when speech should be considered as criminal incitement. This test is particularly useful for prosecutors, defense lawyers and, most importantly, judges in arguing and deciding cases. As indicated previously, the test draws on the papers presented to the OHCHR workshops by ARTICLE 19, which were consolidated in a policy paper released shortly after the RPA was adopted.⁸² Although the RPA does not directly recommend that state authorities rely on this six-part test, the decision to include it as part

⁷⁷ Ibid.

⁷⁸ RPA, para. 58, *supra* note 2.

⁷⁹ See also Principle 10.1 of the Camden Principles on Freedom of Expression and Equality, which states: “Politicians and other leadership figures in society should avoid making statements that might promote discrimination or undermine equality, and should take advantage of their positions to promote intercultural understanding, including by contesting, where appropriate, discriminatory statements or behavior,” (*supra* note 47).

⁸⁰ RPA, paras. 52–54, *supra* note 2.

⁸¹ RPA, paras. 50 and 51, *supra* note 2.

⁸² *Supra* at note 45.

of the conclusions of the RPA may be deemed to suggest that experts involved in the process leading up to the adoption of the RPA and the OHCHR itself endorse this approach to determining whether the threshold of incitement has been reached. In terms of the development of understanding on the limits of freedom of expression with respect to incitement to hatred, the presentation of this six-part test is a major breakthrough.⁸³

The six elements of the threshold test are as follows:

1. *Context*: Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated.
2. *Speaker*: The speaker's position or status in the society should be considered, specifically the individual's or organization's standing in the context of the audience to whom the speech is directed.
3. *Intent*: Article 20 of the International Covenant on Civil and Political Rights anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under Article 20 of the Covenant, as this article provides for "advocacy" and "incitement" rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.
4. *Content and form*: The content of the speech constitutes one of the key foci of the court's deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed.
5. *Extent of the speech act*: Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public,

⁸³ See also the proposal by Susan Benesch Senior Fellow, World Policy Institute, of draft guidelines for monitoring speech and evaluating its dangerousness: Benesch, "Dangerous Speech along the Path to Mass Violence," 12 January 2012, <http://www.worldpolicy.org/content/dangerous-speech-along-the-path-to-mass-violence>.

what means of dissemination are used, for example by a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work) is circulated in a restricted environment or widely accessible to the general public.

6. *Likelihood, including imminence*: Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct.

These elements of the threshold test are the same as those presented in ARTICLE 19's policy brief *Prohibiting Incitement to Discrimination, Hostility or Violence*, which elaborates on each part in much greater detail.⁸⁴

Fifth, and finally, the RPA identifies certain background norms and institutions as prerequisites for the effective implementation of laws on incitement to hatred. These include an independent judiciary that is aware of international human rights standards and independent national human rights institutions (which meet the standards of the Paris Principles),⁸⁵ guarantees of the right to fair trial and the right to an effective remedy as well as legal assistance for members of minorities and vulnerable groups.⁸⁶

III. Conclusion

This chapter has explored the significance of the RPA from the perspectives of its context, process and content. State and non-state actors should support the RPA by publicly endorsing it, by referring to its interpretation of relevant international obligations and responsibilities, and by implementing its recommendations. One year since its adoption, the dearth of attention the RPA has received in the media and an apparent lack of awareness about the RPA among key actors at the national level may be explained by the level of detail and complexity of the RPA's conclusions and recommendations, particularly the six-part threshold test, as well as the lack of any meaningful publicity campaign to promote its terms. While UN human rights bodies

⁸⁴ Supra note 45; supra note 2.

⁸⁵ RPA, paras. 27 and 30, supra note 2.

⁸⁶ RPA, paras. 31, 33 and 32 respectively, supra note 2.

are likely to continue to refer to the RPA in the future, it is crucial that the recommendations of the RPA resonate beyond the UN system and become a critical reference point in confronting the problems of incitement to hatred for specific individuals and bodies within states—key state actors (namely judges, prosecutors, the police, equality bodies or national human rights institutions), the leadership of political parties and editors working with online and offline media. The challenge therefore seems to be of creating an environment whereby such actors commit to implementing the RPA's terms, one that requires a more sustained marketing campaign for the RPA, involving the OHCHR, supporting states, NGOs and the media – to raise greater awareness about the RPA and also actively promote its terms. The arguments for the RPA's considerable legitimacy set forth in this article would be relevant for such an exercise.

Free to Hate? Anti-Gypsyism in 21st-Century Europe

BERNARD RORKE

I. Introduction

Right across Central and Eastern Europe, more than 20 years after the transitions from dictatorship, there remains one glaring democratic shortfall. The Roma, Europe's largest ethnic minority, became the losers in the system changes that swept the region since 1989—two decades on the Roma are the most impoverished, the most despised, and the most excluded citizens in the brave new world of multiparty democracy and the free market economy. The Romani population in Europe today is variously estimated at between 7 and 10 million people. Precise demographic data are not available; however most observers agree that the two waves of European Union enlargement in 2004 and 2007 meant that approximately 4.5 million Roma became EU citizens.

Although Roma have historically been among the poorest people in Europe, the extent of the collapse of their living conditions since the fall of communism was unprecedented.¹ The experience of deep poverty is compounded by discrimination, segregation, and hostility from significant sections of ethnic majority populations increasingly receptive to hate speech, and at best ambivalent in the face of racially motivated acts of violence against the Roma.

¹ "Roma are poorer than other groups, more likely to fall into poverty, and more likely to remain poor. In some cases, Roma poverty rates are more than 10 times that of non-Roma. A recent survey found that nearly 80% of Roma in Bulgaria and Romania were living on less than \$4.30 per day. Even in Hungary, one of the most prosperous accession countries, 40 per cent of Roma live below the poverty line" (Dena Ringold et al., *Roma in an Expanding Europe: Breaking the Poverty Cycle* (Washington, DC: The World Bank, 2005), xiv.

For many observers not overly familiar with the region, the virulence of anti-Roma prejudice in Central Europe often comes as a profound shock. Examples of violence, intimidation, and abuse against Roma are so widespread and occur with such persistent regularity, that the politics of hate in the newer EU member states has somehow become banal and mundane. Anti-Gypsyism rarely excites outrage among the broader citizenry; the public reactions to hate speech, mob violence, arson attacks, even killings are at best ambivalent—and at times, from significant sections of the public, openly supportive.

Such is the situation that even natural disasters become racialized, providing opportunities for bigoted commentators to further vilify Romani citizens. In June 2013 in the Czech Republic, the news server Romea.cz exposed the lies, and tracked the responses to, two online articles concerning the alleged misbehavior and ingratitude of Romani families evacuated from their homes because of flooding in Ústí nad Labem. That these articles amounted to incitement to racial hatred can clearly be discerned from the so-called discussion postings that followed. A shocking sample of the online responses published by Romea.cz provides some flavor of 21st-century anti-Gypsyism in Central Europe:

Mirek Cech Mašek: Hitler unfortunately didn't finish the job.

Jiří Zachrla: He could have completed it and we wouldn't have to deal with these scum.

Lenka Viktorová: Them again—shoot the vermin, right?!!

• • •

Jiří Kračman: We should use a bulldozer to push that rabble into the Danube. They can all swim back to wherever they came from... .

Mirda Čechlík: Well if it's not enough for the brown Czechs, next time they won't get NOTHING! Then once again we will all be a band of racists and volunteer thieves. So next time let people take care of the decent folks who don't turn their noses up at bread and tea. We shouldn't give a shit about the others! As far as danger goes, it's a shame that waste isn't radioactive.

• • •

Andrea Flídrová: They don't have any upbringing, the swine, they should leave the Czech Republic!

• • •

Oldřich Machala: Up against the wall and shoot them, or drive them into the quarries, surround them, and let them die of hunger if they don't want a bullet to the skull.

• • •

Nad'a Pastorková: Those illiterate thieves! If it weren't for the Czechs, they would be eating roots and pitching tents, they'd be going to the toilet in holes, the ungrateful bastards! I am getting sicker and sicker of them. Move them far away, these Neanderthal drug users don't belong in a civilized society! As far away as possible, let them govern themselves, maybe they'll all kill one another off, then we'd have peace and quiet!²

The “context” of anti-Gypsyism and the connections between hateful words and heinous deeds pose profound and troubling questions for champions of free speech and opponents of content-based bans. Racist broadsides in the public sphere, which degrade and dehumanize Roma, and often border on incitement to racial hatred regularly prompt calls for prohibitions and tighter restrictions on what can and what cannot be said. In terms of context, a useful point of reference is part one of the “six-part incitement test” proposed by ARTICLE 19 to establish clear boundaries between permissible and impermissible forms of expression:

[T]he context may be characterized by frequent acts of violence against individuals or groups based on prohibited grounds; regular and frequently negative media reports against/on particular groups; violent conflicts where groups or the police oppose other groups; reports raising levels of insecurity and unrest within the population.³

This is a characterization of the context that too many Roma citizens are familiar with. However, there is a cluster of compelling arguments that suggest, whatever the context, an emphasis on reactive prohibitions or prior restraint is misplaced: that the practical impact of imposing restrictions on freedom of expression to defend or advance the rights of Roma or any other minorities is disputable; that restrictions on freedom of expression enacted under cover of containing hate speech actually allow those who wield power greater leeway to suppress dissenting voices by codifying them as hateful. And last but not least, there is the compelling political calculation that in a viral communication age, ineffective attempts (however honorable the intent) to stifle forms of freedom of expression (however noxious), might actually prove counterproductive.

² František Kostlán, “Analysis: How to Produce Hate, or, Roma, the Czech Floods, and the YMCA,” Romea.cz, 13 June 2013, <http://www.romea.cz/en/news/czech/analysis-how-to-produce-hate-or-roma-the-czech-floods-and-the-ymca#>.

³ ARTICLE 19, *Prohibiting Incitement to Discrimination, Hostility or Violence: Policy Brief* (December 2012), 29–30, <http://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf>.

It has often been argued that focusing on hate speech is in fact something of a distraction and that it would be far better to redouble efforts to tackle the structural racism and discrimination that perpetuates systems of “undeclared apartheid” across the continent.

One persuasive rebuttal to this line of reasoning is that the torrent of disparaging, discriminatory and hateful speech targeting Roma fosters and sustains a broad consensus that “Gypsies get what they deserve”; that beyond the hard core of haters, such speech contaminates the public sphere in a manner that inhibits any sense of solidarity or empathy; and the cumulative effect is that majority populations fail (or feel emboldened to refuse) to recognize discriminatory treatment of Roma for what it is—unreconstructed racism.

This essay will provide some insight into the context of 21st-century anti-Gypsyism; explore the circumstances that might merit content-based restrictions on hate speech against Roma; and reflect on what might constitute the most effective responses to counter racist words and deeds.

II. Prejudices Past and Present

In 1938, Hannah Arendt wrote: “That the Jews are the source of antisemitism is the malicious and stupid insight of antisemites.”⁴ As though nothing was learned from the dark times of the 20th century, such malicious and stupid insights can be heard today in the strident racist and populist chorus blaming the Roma for the discrimination they endure and the hatred and prejudice heaped upon them.

While analogies with the 1930s might make for good journalism, we need to be somewhat circumspect in drawing them lest we exaggerate the threat posed by neo-Nazis to democracy in 21st-century Europe.⁵ However, last year walking home through Budapest’s 7th district, often referred to as the city’s Jewish quarter, it was difficult not to be chilled by specters of dark times. An English-language graffiti scrawl “Hate is where the heart is” caught my attention. Bizarrely, as if on cue, a group of Magyar Gárda—types clad in

⁴ Hanna Arendt, “Antisemitism,” in Hannah Arendt, *The Jewish Writings*, ed. Jerome Kohn and Ron H. Feldman (New York: Schocken Books, 2007), 47–48.

⁵ As Cas Mudde argues, while Greece and Hungary provide cause for alarm, confronted as they are with a “particularly dangerous far right opposition which is truly anti-democratic,” Europe is not at the brink of a Weimar Germany scenario: “In sharp contrast to the situation in Weimar Germany in the early 20th century, extremists are relatively minor political players in the Europe of the early 21st century. Even more importantly, whereas the Weimar Republic was a democracy without democrats, democracy is hegemonic in contemporary Europe” (Cas Mudde, “The Myth of Weimar Europe,” *openDemocracy* 20 August 2013, <http://www.opendemocracy.net/can-europe-make-it/cas-mudde/myth-of-weimar-europe>).

black uniforms stumbled around the corner shouting about “*mocskok zsidok es budos ciganok*” (filthy Jews and stinking Gypsies), giving raised armed salutes to fascist thugs on the other side of the road who responded with “*Adjon az Isten szebb jövőt!*” (God grant us a better future!)

These very streets bore witness to some of the worst excesses of 20th-century barbarism. On these streets, on the night of 15 October 1944, Zsuzsa Gábor was one of a group of Jews, forced at gunpoint from their house in a raid by Hungarian and German Nazis that left 18 people dead. The rest—mothers with toddlers and helpless old people among them—were herded down Aradi Utca, then Terez Korut, as far as the school in Kertesz Utca with their arms in the air.

Then we were shoved into a large white-washed cellar and beaten and thrashed regardless of age or anything... . [A] piece of biscuit wrapped in paper was found in my 18-year-old cousin's pocket. They wanted to cram it into his mouth ... but he resisted and was beaten to death in front of his own mother... . [T]hey picked the men out of the mess, and crammed them into another part of the cellar. Their screams and cries could be heard all night long. No one ever saw them again, dead or alive.⁶

During a ceremony at the Holocaust Memorial Center for Romani victims of the Nazi genocide in Budapest in August 2012, those in attendance were reminded that it was three years ago to the day since Maria Balogh was murdered in her bed, and her 13-year-old daughter Ketrin seriously wounded, in a gun attack by neo-Nazis in the village of Kisléta. This was the final assault in a terror campaign targeting Romani settlements that claimed the lives of six and wounded many others. In his speech, György Hölvényi, Minister of State for Church, Minority and Nongovernmental Relations in Hungary, declared that the government was determined that there will be no place for hatred among Hungarian citizens.

It's become hard to reconcile this righteous intent with reality. In January 2013, following a New Year stabbing incident, the journalist Zsolt Bayer wrote in a national daily that “a significant part of the Roma is unfit for coexistence... . They are not fit to live among people. These Roma are animals, and they behave like animals... . These animals shouldn't be allowed to exist. In no way. That needs to be solved—immediately and regardless of the method.”⁷

⁶ Zsuzsa Gábor, “Romeo 1944,” in Katalin Pécsi, ed., *Salty Coffee: Untold Stories by Jewish Women* (Budapest: Novella Publishing, 2007), 50.

⁷ Robert Hodgson, “Bayer at Bay, Fidesz Defiant as Political Pack Howls for Blood,” *Budapest Times*, 22 January 2013, <http://www.budapesttimes.hu/2013/01/22/bayer-at-bay/>.

Bayer is one of the main organizers of the progovernment peace marches, a founder member of Fidesz, and a long-time confidante of Prime Minister Viktor Orbán. Viviane Reding promptly condemned the remarks as unacceptable: "The European Union has no room for racism, hate speech or any other forms of intolerance."

It seems, however, that in this corner of the European Union, there is room for hate speech. The response from Fidesz spokeswoman Gabriella Selmeczi was that Bayer wrote this article "not as a politician, but as a journalist," adding that "we don't qualify the opinions of journalists." Despite the fact that nobody was killed in the incident, Selmeczi went on to accuse left-wing and liberal opposition parties of "encouraging criminals by blaming not the killers but those who are outraged [by their crimes]." Paying tribute to Bayer at his 50th birthday celebration, Speaker of Parliament László Kövér was even more forthright: "Good and bad, hard times and joy, we experienced it together. We never once denied each other and we never will."

The response of the government was similar in the wake of protests last year by university teachers, students, and researchers who found remarks by Géza Jeszenszky, Hungary's ambassador to Norway, to be offensive against Roma. In a textbook used at Budapest's Corvinus University (BCE), Jeszenszky suggested that "the reason why many Roma are mentally ill is because in Roma culture it is permitted for sisters and brothers or cousins to marry each other or just to have sexual intercourse with each other." The Ministry of Foreign Affairs insisted that Jeszenszky cannot be accused of prejudice for his words, "which he wrote as a university professor and not as ambassador."⁸

It's hard to reconcile the fine sentiments contained in the government's Roma integration strategy, with its equivocation in the face of statements that disparage, dehumanize, and degrade Roma. If this is what counts as elite opinion in government circles, it's little wonder that anti-Roma prejudice is so widespread and so strident among the citizenry in Hungary.

The gravity of the current situation was highlighted in research conducted by Political Capital in 2011, which placed Hungary fifth out of 33 countries on a "radicalism" index, with sympathy with far-right ideas and politics among the over-15s surging from 10 percent to 21 percent: "a practically unprecedented rise by international standards." A survey question on "Gypsy crime" found that 63 percent of Hungarians view "the Roma inclination to commit crime" as genetically predetermined; while approximately two-thirds of respondents would not allow their children to befriend a Roma.⁹

⁸ Bernard Rorke, "What Can the EU Do for Roma in the Face of Rising Populism and Prejudice?" *Open Society Voices*, 20 March 2013, <http://www.opensocietyfoundations.org/voices/what-can-eu-do-roma-face-rising-populism-and-prejudice>.

⁹ Hungary around the Clock, "International 'Radicalism Index' Puts Hungary Fifth of 33 Countries; Belief in Genetic Roots of Roma Crime Widespread," *Politics.hu*,

Like most forms of prejudice, anti-Gypsyism is neither static in terms of its content, nor is it somehow spread evenly across the politics of the European continent. Within different states, prejudice against Roma is more or less pervasive, more or less overt, manifests itself to differing degrees and in very specific direct and indirect forms against Roma, and takes its bearings from the flows and eddies of wider political developments.

Something of what we might call the “traditional” free-floating and inchoate cluster of prejudices against Roma is conveyed in this memory of a Montenegrin childhood:

We children had been brought up by mothers and grandmothers on stories of Gypsies’ evil deeds, of kidnapped white children, blinded so they could beg, of roaming at night through graveyards, of cannibalism, black magic and the evil eye, by which they could make a healthy man fall ill, go mad or die. For us, Gypsies represented the same kind of evil as the Turks had done for our forefathers.¹⁰

The politically orchestrated anti-Gypsyism we witness in many European countries today is of a different order. For far-right parties, their paramilitary guards, and associated media outlets, prejudice has become a mobilizing force. And unabashed and uninhibited anti-Roma prejudice has taken center stage with crude ultranationalism as core ingredients in a wider radical populist assault on the so-called liberal consensus.

III. The Dark Side of Democracy

Many media observers linked the rise in anti-Gypsyism to the most recent global economic crisis. This makes for easy copy in hard times. The acts of violence against Roma by state and nonstate actors, the coarsening of public discourse colored by inflammatory racist rhetoric, and the increase in broad public hostility toward Roma predates the economic downturn and forms part of a wider populist assault on the liberal content of contemporary democracy. While it is entirely plausible that an economic crisis may aggravate existing tensions and further erode the legitimacy of governing elites, anti-Roma prejudice remains well-nigh ubiquitous and has long thrived in good times and bad times alike.

5 December 2011, <http://www.politics.hu/20111205/international-radicalism-index-puts-hungary-fifth-of-33-countries-belief-in-genetic-roots-of-roma-crime-wide-spread/>.

¹⁰ Quoted from Bernard Rorke, “The Roma: Rights and Recognition,” [Centre for the Study of Democracy] *CSD Bulletin* 8.1 (Winter 2001): 6–8.

In a very prescient “political risk warning” issued in 2007, the Budapest-based think tank Political Capital Institute warned that the strategy of the newly formed Hungarian Guard would “induce violent conflicts” by strengthening current ethnic tensions between Roma and non-Roma populations. It pointed to the failure of the political elite to take the threat seriously, allowing radical political groups to “expropriate public discourse” about the so-called Gypsy problem. This passivity provided extremist groups with the opportunity to set the agenda, build a political platform and expand their constituency of support around a single issue: the Gypsy problem, and, more specifically, “Gypsy criminality.” Political Capital stated that the consequence of this failure to take Jobbik and the Hungarian Guard seriously worsened matters in a way which “makes normal dialogue impossible, strengthens public support for far-right groups and increases the possibility of violent conflicts.”¹¹

To better comprehend the recent ominous and lethal surge in anti-Gypsyism it is more appropriate to attribute it to a wider political malaise than forge a synthetic, reductive link with current economic woes. Among the new EU member states, political instability and an erosion of trust in democratic institutions has led to a situation where, as Jacques Rupnik put it, “Democracy has no rivals but is losing supporters. Populist movements, to some extent express that ambivalence and discontent.”¹² Described by Ivan Krastev as “the new, electoral version of the Molotov cocktail,” populism is not anti-democratic but profoundly anti-liberal. Common features include authentic anger, unrestrained hatred of the elites, cultural conservatism, euro skepticism, declared nationalism, and undeclared xenophobia.¹³ At the extremes of the radical right, in polarized political contexts, xenophobia is “declared” and much of the “authentic anger” is directed toward Roma and other minorities.

Back in 1996, reflecting on the rise of Jorg Haider and the Freedom Party in Austria, Tony Judt cautioned against indulging the thought that this represented some kind of renascent fascism or even a sort of para-Nazism, “an echo of the ghosts of Europe past,” but rather that the successes of Haider and his ilk stand for something more far more serious: “[T]hey are the ghosts of Europes yet to come.”¹⁴

¹¹ Political Capital Institute, “Political Risk in Hungary Has Increased Due to Actions of the Hungarian Guard,” *A Risk Warning by Political Capital Institute*, 14 December 2007.

¹² Jacques Rupnik, “Populism in Eastern Central Europe,” *Eurozine*, 10 September 2007, <http://www.eurozine.com/articles/2007-09-10-rupnik-en.html>.

¹³ Ivan Krastev, “The New Europe: Respectable Populism, Clockwork Liberalism,” *openDemocracy*, 21 March 2006, <http://www.opendemocracy.net/node/3376>.

¹⁴ Tony Judt, “Austria and the Ghost of the New Europe,” *New York Review of Books* 43.3, 15 February 1996, <http://www.nybooks.com/articles/1634>.

However, walking through Szabadság Tér (Freedom Square) in Budapest on 4 June 2010, on the anniversary of the Treaty of Trianon (1920), a day when Hungarian nationalists mourn their lost and sundered territories, it was difficult to ignore the “ghosts of Europe past.” I had stumbled on the inauguration of the new “national” Hungarian guard and I seemed to be the only civilian in a square filled with thousands of young men and women, *squadristi* clad in paramilitary uniforms, waving the flags of fascisms past, marching in formation, following orders issued by men in the banned black uniform of the Magyar Gárda. This is the paramilitary wing of Jobbik (the Movement for a Better Hungary), a party that commanded 16.7% of the vote in the general election on 10 April 2010, and is represented in the European Parliament, a party that has mobilized a wider radical constituency prepared to engage in public disorder and violence, a constituency united by a visceral hatred of Roma and Jews.

Rereading Michael Mann’s *Fascists*, one cannot help but be struck by parallels with the prewar period: in the 1930s the Arrow Cross demonstrated, marched and sometimes brawled but rarely went beyond that. They drew 25% of the national vote, but did best in red belt industrial suburbs, among mining communities and poorer agricultural communities. The rise in the Arrow Cross vote was proportionate to the decline in the socialist vote.¹⁵ Hungarian fascism differed from Italian fascism or Nazism in that its mass support was rather proletarian. As Mann states: “The Arrow Cross did more than appeal to workers outside the core “proletarian ghettos” (as other successful fascisms managed to do). It also penetrated *inside* the proletarian ghetto, in the capital and some rural areas. This owed much to the weakness of socialism”¹⁶ The Arrow Cross claimed to transcend class politics, and incorporated leftist ideas. Their leader Ferenc Szálasi denied being an intolerant nationalist, and insisted that he was “a-Semitic” not anti-Semitic. While they rarely attacked capitalism head on, they preferred to denounce “adjectival capitalisms” and attacked the corruption of the elite and exploitation by finance, foreign and Jewish capital.¹⁷

¹⁵ The Perspective Institute, a Budapest polling firm, in an analysis of the Jobbik performance in the 2009 European Parliament elections in which the party scored 14.8 percent, found that swathes of left-wing voters were turning toward Jobbik: “The Hungarian extreme right doesn’t primarily recruit its supporters from the centre-right but instead from the leftist camp disappointed with the governmental performance of MSZP [the Socialists]. Jobbik, in certain cases, succeeded in doubling its nationwide share of the votes in cities that had been Socialist strongholds” (Leigh Phillips, “A Far-Right for the Facebook Generation: The Rise and Rise of Jobbik,” *EUObserver*, 19 April 2010, <http://euobserver.com/843/29866>).

¹⁶ Michael Mann, *Fascists* (Cambridge: Cambridge University Press, 2004), 258.

¹⁷ *Ibid.*, 246.

For anyone familiar with the meteoric rise and mendacious rhetoric of Jobbik there is much that resonates. The investigative journalist Szilvia Varró described Jobbik as the wunderkind of the European extreme-right scene. With its combination of successful use of new media and communications, its radical and forthright language, and the conscious grassroots mobilization and structure of the party, it was able to connect with the younger generation. In part, Jobbik owes its success to the impotent socialist–liberal government which had been in power for eight years, but failed to dissolve the Roma ghettos; failed to address poverty; and did nothing to help the multiply disadvantaged impoverished micro-regions.¹⁸

IV. “Gypsy Crime” and the Politics of Racism, Fear and Loathing

What is different today, apart from the obvious geopolitical dynamics of 21st-century Europe, is that the traditional staple of anti-Semitism now plays second fiddle to anti-Gypsyism, with the far right striking a populist chord by focusing on so-called Gypsy crime. Jobbik spokespersons such as Zsolt Várkonyi are lurid and forthright on the topic: “There is a reality to what we say about gypsy crime. There were 118 cases of gypsies committing crimes against Hungarians from 1993 to 2009... . We don’t need sociological explanations... . How does a sociological explanation feel to an old lady who has had her head cut off by an 18-year-old gypsy, or a girl who is tied to a tree and raped and then set on fire?”

Tension had already been mounting in Hungary following the murder of a well-known Romanian handball player Marian Cozma in Veszprem on 8 February 2009 when his assailants were identified as Roma by the media. Zsolt Bayer wrote in the daily *Magyar Hírlap*: “Everyone in the whole wide world knows that those murderous animals were Gypsies.” He concluded that “A huge number of Gypsies have given up on coexistence and given up on their humanity.”

Against this backdrop of prejudiced media reporting, widespread anti-Gypsyism and far-right paramilitarism came a wave of terror as Roma settlements were targeted in a series of gun and bomb attacks. The slaying of Robert Csorba and his six-year-old son Robika in Tatárszentgyörgy in 2009 prompted European Commissioner Vladimir Špidla to declare that, “Roma have become the target of organized racist violence—fed by political popu-

¹⁸ Bernard Rorke. “The Rise of the Far Right and Anti-Gypsyism in Hungary,” Open Society Foundations website, 13 April 2010, <http://blog.soros.org/2010/04/the-rise-of-the-far-right-and-anti-gypsyism-in-hungary/>.

lism, hate speech and media hype ... and are being made scapegoats for wider societal problems.”¹⁹

That the double murder of the Csorba father and son would be followed by the assassination of Jenő Kóka, gunned down as he left home for his night shift in Tiszalok, left Roma communities reeling with shock. In the aftermath, his goddaughter, Ágnes Kóka, a university graduate who has worked on Roma integration issues for seven years, explained: “We feel like the real targets. The death of my godfather proves that whatever we do, how we try to prove ourselves to the majority population and ourselves as well—the only thing that matters is that we were born to be Roma.” By the time of the slaying of Mária Balog, and the grievous wounding of her 12-year-old daughter Ketrin, shot in their beds by gunmen who smashed their way into their home in Kisléta, the police finally conceded the wave of killings were connected, were racially motivated, and in the aftermath of this atrocity raised the reward for information to a record 100 million Hungarian forints. Six Roma were slain by the time the killers were apprehended. Men, women and children were among the dead and the wounded.

In an address to more than 60 senior Hungarian police officers on the topic of policing in a multicultural society, I put it to them that it would be an absurdity and a calumny to describe the series of killings and attacks on Roma as “Hungarian crime.” Hungarian nationals would rightly repudiate any association with fascist killers, and declaim the idea that, as Hungarians, they somehow be held collectively responsible for such atrocities. We would reject out of hand the very idea of “Hungarian crime” as nonsense. Similarly the idea of “Gypsy crime” is patently absurd, and the idea that an entire community be stigmatized, labeled as “innately or inherently criminal” or held collectively responsible for the transgressions of a criminal few is dangerous fascistic nonsense. Nonsense it may be, but the idea of “Gypsy crime” is firmly rooted in what passes for common sense in Hungary today.

There is little under the sun that is new, and criminalizing ethnic minority populations has a long and sordid pedigree. If one were to rewind to early-20th-century Poland, Robert Blobaum reminds us that

To the anti-Semite there is no crime of which the Jew was incapable. In addition to older images of Jews as usurers, swindlers and petty thieves, the modern anti-Semites created new images and fantasies that held Jews responsible for prostitution, the white slave

¹⁹ European Commission, “Statement by Vladimír Špidla on Recent Attacks on the Roma Community,” European Commission website, 26 February 2009, <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=464>.

trade, pornography, the scourges of burglary and armed robbery, fencing stolen goods, cruelty to animals and much more.²⁰

Fast-forward to England in the 1980s—Paul Gilroy explained in his seminal work *There Ain't No Black in the Union Jack* how crime in the form of both street disorder and robbery came to be gradually identified as an expression of Black culture. He described the extraordinary manner in which anxiety about Black crime “provided hubs for the wheels of popular racism.” Gilroy emphasized the durability of these images and their remarkable ability to act both as a focus for popular anxiety about crime in general and as a sign of national decline, crisis and chaos. Rereading Gilroy reminds one just how pervasive, in 1970s and 1980s Britain, were ideas that Black crime was expressive of Black “ethnicity,” and that Black crime could be used to illustrate the problems of crime in general. The populist potential of “Black crime” as an issue meant that such analyses came from both left and right of the political spectrum. The balance between biological and cultural factors in determining ethnicity, is, of course, weighed differently, but where culture or sub-culture is defined as a fixed or impermeable property of human life these are differences of degree rather than any fundamental divergence.²¹

In 21st-century Europe, the trope of “Gypsy crime” performs the same function in the relatively new democracies of Central and Eastern Europe, a trope held together with a sordid glue of the biological and cultural, mixing racisms old and new.

And the link between words and deeds, between anti-Roma rhetoric and lethal racist violence was made chillingly clear in the indictments against those charged with the series of killings in Hungary. The accused neo-Nazis shared a conviction that the state, the judiciary and the police were not doing their job in dealing with “Gypsy crime.” The indictment notes that in August of 2007 the defendants attended the inauguration of the Magyar Gárda. They deemed it unfit to solve the “social situation,” and resolved to arm themselves to take an active role in “restoring order.” They selected their targets for killing based on media reporting, “their attention drawn to wherever there was a significant Roma-Hungarian conflict.”

The killers may have been caught, but prejudice and intimidation continued to prevail. In March 2011, in Gyöngyöspata, uniformed neo-fascist paramilitaries, backed up by skinhead auxiliaries with whips and fighting dogs, set up checkpoints and patrolled a Roma settlement with seeming

²⁰ “Criminalizing the ‘Other’: Crime, Ethnicity, and Anti-Semitism in Early Twentieth Century Poland” in Robert Blobaum (ed.) *Antisemitism and Its Opponents in Modern Poland*. Cornell University Press, 2005.

²¹ Paul Gilroy, *There Ain't No Black in the Union Jack: The Cultural Politics of Race and Nation*, Routledge Classics, 2002.

impunity, as policemen stood idly by. According to eyewitness reports, the local police looked on while guardsmen intimidated Roma women and children on their way to and from school, and spat on members of parliament who dared to cross the lines to meet local Roma leaders. The siege lasted for two and a half weeks. Similar displays of intimidation and force elsewhere signaled a clear intent by the far right to instill fear among Roma citizens. The reaction of Prime Minister Viktor Orbán that “ugly things could have happened” and were avoided because the police acted with sufficient deterrent force smacked of complacency. It is a profoundly ugly thing for a democracy, nesting within the European Union, when the state’s monopoly on the use of force is usurped by fascist militias acting on the behest of the Jobbik party, whose representatives sit in both the Hungarian and European Parliaments. It is a profoundly ugly thing when ethnic minority citizens are terrorized, abused, and besieged in a manner reminiscent of the 1930s.

The reaction of the citizens of Gyöngyöspata to the events and the consequent international media attention was to elect Jobbik candidate Oszkár Juhász as mayor in a poll where 45% of the electorate voted for far-right candidates. Juhász declared his intent to impose law and order by introducing field patrols and an armed “local” police force. Confounding its critics, Jobbik managed to recapture the level of support it commanded at the 2010 elections. According to *Political Capital*, this was attributable to the Jobbik leadership’s public reaffirmation of a more radical and belligerent style of politics: reverting to street politics, stepping up anti-Roma and anti-Semitic rhetoric and backing up Magyar Gárda-style organizations: “Clearly, stoking ethnic tension is in the political interest of Jobbik and other far-right organizations with ties to the party.”

The ideology underpinning the contemporary politics of hate in Hungary combines anti-Roma prejudice with more traditional anti-Semitic conspiracy theories. According to the far right, conflict between Hungarians and Gypsies is stoked by international Jewry bent on colonizing Hungary. In the wake of the Gyöngyöspata occupation, Jobbik MP Lóránt Hegedűs felt that “the time has come to state it clearly: Israel is bent on conquering Hungary. This is a fact; as evidence, it is enough to look at the all but total monopoly of Israeli investments and real estate developments. And the Gypsies are a kind of biological weapon in this strategy. They are used as a means against the Hungarians just as, to use a simple analogy, a snow plough is hitched to a truck.”

In a consolidated democracy such absurd nonsense would be widely dismissed as the ravings of the demented and deluded. However, in a country where, as *Political Capital* put it, “the collapse of confidence in democratic institutions” has seen the number of those sympathizing with far-right ideas more than double between 2002 and 2009, the fact that such rhetoric has been given free rein in Hungary, and resonates so widely, poses very acute dangers:

For years, prominent public figures have left public discussion and the shaping of public opinion on the Roma issue to forces representing radical and extremist political organizations. This continues to exacerbate problems, eliminating all possibilities for a dialogue, consolidating the far right and increasing the potential for future violent conflicts.²²

V. Betwixt and Between Hateful Words and Heinous Deeds: What Is to Be Done?

Ant-Gypsyism contaminates public life in too many European Union member states. Thomas Hammarberg described the emergence of a climate of intolerance against Roma and other minorities as a shift from “traditional” prejudice to “outright racist attitudes, preached by marginal yet increasingly visible political groups and left largely unchecked by mainstream society.” Leading politicians from the newest EU member states have described Roma as bad human material, and without inhibition claim that Roma are genetically disposed toward criminal activities, and describe Roma communities as “incubators of crime.” As Hammarberg observed:

The increase in anti-Roma rhetoric goes hand in hand with changing patterns of violence against Roma and Sinti. While at the beginning of the 1990s we witnessed cases of impromptu community violence against Roma, we see today a growing number of attacks on Roma committed by individuals mobilized by racist anti-Roma ideology. These are premeditated attacks, with the intent to kill, that target random individuals or families because of their ethnicity.²³

As Ambassador Janez Lenarčič (Director of the OSCE Office for Democratic Institutions and Human Rights) stressed, in reference to the Czech Republic in 2011, manifestations of intolerance including anti-Roma rhetoric from public figures at the national and local level, and extremist intimidation of Roma communities contribute to a hostile environment that has a negative impact on integration efforts. Two years on, expressions of intolerance continue and the environment has become even more hostile. On one Saturday in late

²² Political Capital, “The Second Season of Patrolling in Hungary,” RiskandForecast.com, 4 May 2011, http://www.riskandforecast.com/post/hungary/the-second-season-of-patrolling-in-hungary_694.html.

²³ Thomas Hammarberg, *Human rights of Roma and Travellers in Europe*, Council of Europe Publications, February 2012. http://www.coe.int/t/commissioner/source/prems/prems79611_GBR_CouvHumanRightsOfRoma_WEB.pdf

August 2013, roughly 1,500 Neo-Nazis and their sympathizers participated in anti-Roma “hate marches” in eight towns across the Czech Republic. In the ensuing disorders, a total of 101 persons were detained. Ostrava witnessed the worst outbreaks of violence, when hundreds of rioters clashed with police in their failed attempts to storm a Roma neighborhood.²⁴

Given the context has become so charged, the political question then is: How best to react to the content of hate speech? In terms of how best to react to such manifestations in a representative democracy, there are two important considerations if one is to shift from the realm of moral condemnation to legal regulation: first, the need to define precisely what constitutes hate speech; and second, the need to insist on the plain fact that there remains a crucial distinction between saying something and doing it.

Among those who would ban, and those who would not, there is agreement that a degree of definitional precision is vital. As Bhikhu Parekh says: “Hate speech is a distinct kind of speech and much conceptual confusion is created—and the net of prohibition unduly widened—by subsuming all forms of uncivil and hurtful speech around it.” Parekh provides what he terms a reasonably precise meaning, and ascribes three essential features to hate speech:

- First, it is directed against a specified or easily identifiable individual, or more commonly, a group of individuals based on an arbitrary and normatively irrelevant feature.
- Second, hate speech stigmatizes the target group by implicitly or explicitly ascribing to it qualities widely regarded as highly undesirable. The negative qualities might be considered remediable and contingent, in which case the speaker is implying that the target group is required to rid itself of them to be accepted. Or they might be considered an inherent part of the group’s identity, in which case it is permanently condemned.
- Third, because of its negative qualities the target group is viewed as an undesirable and untrustworthy presence and a legitimate object of hostility. If it is impossible to expel or exterminate the group, it may rightly discriminate against and tolerate it as an unavoidable evil confined to a shadowy existence on the margins of society.

Much of the anti-Roma hate speech that is common currency in 21st-century Europe falls squarely within the broad parameters of Parekh’s three essential features. Having set out what is distinctive about hate speech to prevent the net of prohibition being “unduly widened,” Parekh then proceeds to dismiss notions of imminent danger, stretching the net to include speech which may

²⁴ “Czech Republic: Anti-Roma Marches Result in 101 People Detained,” Romea.cz, 26 August 2013, <http://www.romea.cz/en/news/czech/czech-republic-anti-roma-marches-result-in-101-people-detained>.

not result in violence, for what matters is content which should be judged by its “long-term effects” on a targeted group rather than its immediate consequences.

In terms of “likely long-term consequences,” Parekh charts a somewhat inevitabilist trajectory, where vicious and widespread hatred of a group builds up slowly, coarsens public sensibility, poisons the minds of the young, until the violence implicit in hate speech comes to the fore, gradually gathering a momentum of its own. He then asserts that

If anything can be said about a group of persons with impunity, anything can also be done to it. This is because if a group can be treated with contempt, stripped of dignity, dehumanized, treated as belonging to an inferior species, and a moral climate is created in which harm done to it is seen as right and proper and does not arouse a sense of outrage.²⁵

For Europe’s Roma, there is no doubt that they have been treated with contempt, dehumanized, and that harm done to them does not arouse a sense of outrage; there is no doubt that disparaging, inflammatory and hateful anti-Roma speech has coarsened public sensibility and strikes at the core of notions of shared belonging. But it simply does not follow that “if anything can be said about a group with impunity, anything can also be done to it.” This is not to diminish the gravity of the situation facing Roma, but merely to insist that in real life in actually existing democracies, whatever the connection there still remains a vital distinction between the word and the deed.

Parekh maintains that free speech flourishes and is indeed only possible under some conditions, such as some degree of political and social stability, intercommunal harmony, and a culture of civility. He asserts that the “nervous society” lacks both the confidence to live with dissent and vigorous debate and the ability to cope with their consequences.

This begs the obvious question: Who decides when citizens can cope with dissent, vigorous debate, and its consequences? We all inhabit nervous societies, where economic crises have exacerbated inequality, heightened tension and bred uncertainty, where the liberal content of democracy comes under constant threat. Who would sensibly cede even more powers to government to circumscribe freedom of expression in a state such as Hungary, where the political capture of key institutions and parallel weakening of checks and balances prompted the Council of Europe to contemplate launching its first monitoring procedure against an EU member state; where the

²⁵ Bhikhu Parekh, “Is there a case for banning hate speech?” in Michael Herz and Peter Molnar, eds., *The Content and Context of Hate Speech: Rethinking Regulation and Responses*, Cambridge University Press, 2012, 37–56.

Fourth Amendment to the Fundamental Law of Hungary now states that the right to freedom of speech “may not be exercised with the aim of violating the dignity of the Hungarian nation”?²⁶

The appropriate political response to anti-Roma hate speech, in a region with a vivid and living memory of dictatorship and routinized suppression of free speech, is not more prohibition. When it comes to what people can and cannot say, Kenan Malik asserts that we must distinguish between content-based regulation and effects-based regulation and permit the prohibition only of speech that creates imminent danger. Malik opposes content bans, both as a matter of principle (‘free speech for everyone except bigots is not free speech at all’) and with a mind to the practical impact of such bans. And, when it comes to combating anti-Gypsyism, to combating the words, deeds and institutional practices that denigrate and dehumanize our Roma fellow citizens it’s the practical impact that counts.

As long as torrents of uninhibited anti-Roma hate speech go unchecked and unchallenged, it is understandable that Roma communities at the receiving end might conclude that such prejudices are tacitly shared by those holding power. States must find a way to meet their democratic obligations to protect the fundamental rights of all citizens and counter all forms of direct and indirect discrimination while at the same time protecting freedom of expression.

As ARTICLE 19 suggests, efforts to fight the negative consequences of incitement must be part of a comprehensive policy to challenge prejudice, and that recourse to restrictive legal mechanisms to limit the right to freedom of expression taken only where it is strictly necessary and proportionate.

Toward this end, to guard against arbitrary and intrusive application, and “with a view to promoting a coherent international, regional and national jurisprudence relating to the prohibition of incitement,” ARTICLE 19 proposes that all incitement cases should be assessed under a robust and uniform six-part incitement test to ensure that incitement to hatred is a narrowly confined offence to which states do not resort on too frequent a basis. It would also guard against arbitrary abuse. For, as Nadine Strossen says, there is something of a conundrum in Central and Eastern Europe in that those who call for more restriction, more banning of hate speech against Roma, are in fact calling for more discretionary powers to be handed to states and societies they hold to be inherently racist and discriminatory.²⁷

²⁶ Fourth Amendment to the Fundamental Law of Hungary and Technical Note <http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF%282013%29014-e>.

²⁷ “Interview with Nadine Strossen,” in Michael Herz and Peter Molnar, eds., *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge: Cambridge University Press, 2012), 390.

Similarly, Theodore Shaw's concerns about how a ban on hate speech would operate and be applied in practice, comes with a passionate defense of freedom of expression:

I can't imagine the Civil Rights Movement of the 1960s, or the gay rights movement of more recent years, or the women's rights movement, or *any* movement being possible without free speech. Free speech is essential for minority group members who are challenging systems of subordination, segregation, discrimination, particularly if they are attacking the complicity of government in creating and maintaining those systems of subordination. If we lose the rights to free speech, the ground on which we stand with respect to other civil and human rights becomes quicksand.²⁸

With regards to hate speech, Shaw's is the classic response that the most effective antidote is more speech, and that counterspeech works best when it's not only the targeted minority that speaks up. He cautions against focusing on hate speech legislation that would only drive underground any *expression* of discrimination and hatred, without remedying or reducing the discrimination and hatred itself. Turning to the specifics of Central and Eastern Europe, Shaw says: "So in the context of Roma, for example, I would prefer to see a focus on protecting Roma from violence that is directed at them, whether by individuals or by state actors such as the police. I would prefer to see housing discrimination and employment discrimination and education discrimination attacked."

VI. Conclusion: Toward a Politics of Hope, Not Hate?

The most significant international effort to combat poverty and discrimination in housing, health, education and employment is the EU Framework for National Roma Integration Strategies up to 2020.²⁹ Despite the encouraging signs that European institutions and some governments are waking up to the challenges, too little is changing on the ground for deeply impoverished and socially excluded Roma communities. Indeed, what is most alarming is that

²⁸ "Interview with Theodore Shaw," in Michael Herz and Peter Molnar, eds., *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge: Cambridge University Press, 2012), 411.

²⁹ For background and overview on the EU Framework, see Bernard Rorke, *Beyond First Steps: What Next for the EU Framework for Roma Integration?* (Budapest: Open Society Institute, 2013), <http://www.opensocietyfoundations.org/sites/default/files/beyond-first-steps-20130213.pdf>.

these barely perceptible shifts from above could be stalled or indeed reversed by the rising tide of anti-Gypsyism: widespread and virulent prejudice that threatens to derail progress.

This concern was echoed in June 2013 by the European Commission, which called on member states to “move up a gear” in their efforts on Roma integration. The Communication called on member states to take adequate measures to fight racism, stigmatization, and anti-Roma rhetoric in society; to promote the benefits of Roma integration, sensitize public awareness of cultural diversity; and raise awareness among Roma of their rights, duties, and possibilities to seek redress. The message to member states was clear and unequivocal—effective social inclusion must be accompanied by rigorous implementation of antidiscrimination legislation and respect for fundamental human rights.³⁰

It is clear that a laissez-faire approach to the politics of hate just will not do. If the politics of hate seems to be in the ascendant and Roma most often in the firing line, a “business as usual” approach is not just ethically bankrupt but politically reckless. It is delusory to imagine that the politics of hate will simply run its course; that the attraction of friend–enemy relations, rendered more piquant by anti-Roma prejudice, will just run its course and fade away. The time has come to counter anti-Gypsyism with the kind of broad-based civic and political solidarity that’s needed to make a difference.³¹

A first step would be for the European Union to officially recognize anti-Gypsyism as a long-standing and deeply rooted form of European prejudice. The lived reality in villages, towns and cities where Roma face intimidation and other forms of very direct and indirect discrimination every day, may seem a universe away from resolutions passed in Brussels and Strasbourg. But the European Union has proven to be vitally important in setting and consolidating normative frameworks on a wide range of issues.

Official recognition of anti-Gypsyism would involve a series of positive and practical steps for the European Commission, European Parliament, and member states. Within the context of the EU Framework for Roma Integration there is a need for a concerted drive to work with local authorities, law enforcement agencies, educational institutions, and civil society partners to launch public awareness-raising campaigns, and support community-based initiatives to dispel anti-Roma prejudice and foster intercultural dialogue.

³⁰ Bernard Rorke, “Roma Inclusion: EU Tells Member States to ‘Move Up a Gear,’” *Open Society Voices*, 26 June 2013, <http://www.opensocietyfoundations.org/voices/roma-inclusion-eu-tells-member-states-move-gear>.

³¹ Bernard Rorke, “Hate Is Where the Heart Is: Time for Europe to Confront Anti-Gypsyism,” *openDemocracy*, 2 May 2013, <http://www.opendemocracy.net/bernard-rorke/hate-is-where-heart-is-time-for-europe-to-confront-anti-gypsyism>.

Members of the European Parliament would need to work more assiduously with their political parties back in their home countries to fight prejudice, cultivate majority support for Roma inclusion policies, to combat hate crime and provide effective redress against institutional racism.

The EU should establish a monitoring mechanism on hate crimes against Roma. To date official monitoring of hate crimes does not include such disaggregated public data on violence against Roma, even among member states that have developed adequate monitoring systems on racist violence. This deficit must be remedied.

There is also a need for a coordinated and public Europe-wide “reckoning with history” to shed light and spread knowledge about the mass atrocities against the Roma people in the past. As Thomas Hammarberg put it, “A full account and recognition of the crimes committed against the Roma might go some way to restoring the trust of Roma communities in society.”

For if we are to displace the politics of hate with a politics of hope, solidarity and mutual respect, then we do need trust. And where prejudice and exclusion has long thrived, cultivating and sustaining trust between communities and individual citizens will require unrelenting effort. In their efforts to restore the trust of Roma communities in society, national governments and EU institutions need to get serious about substantive Roma participation. All member states of the European Union need to embrace the idea that active citizenship is fundamental to social inclusion, and includes all of the citizenry regardless of their ethnicity. Roma communities and representatives must be accorded the opportunity for participation in shaping the policies and initiatives that directly impact their lives.

The Role of the Mass Media in the Spanish Transition to Democracy and Its Subsequent Consolidation

JOSEP MARIA CARBONELL and JOAN BARATA MIR

I. Introduction

More than 30 years have passed since the constitutional referendum of 1978 guaranteeing the establishment of a fully democratic administration which would end nearly 50 years of military dictatorship in Spain.

It must not be forgotten that, after the cruel and bloody Spanish Civil War (1936–39) and on the threshold of World War II, Spain experienced a period of self-sufficiency under the nationalist dictatorship of General Franco. In terms of ideology this post-Fascist, Catholic regime was diametrically opposed to those imposed in Central Eastern Europe, after the Yalta Agreement, by the former Soviet Union. Nevertheless, it shared their highly authoritarian structures, including the privation of basic freedoms, such as the right to freedom of expression and information.

Democratic transitions in the then fascist states of Southern Europe began at least a decade before the transitions in Central and Eastern Europe. At the end of the 1970s, the dictatorship of the Colonels in Greece fell. In 1975 a revolution ended the military dictatorship in Portugal. In the same year, General Franco's death sparked transition in Spain—a complex process in which the drama of the million people who died during the Civil War, and the confrontation between “the two Spains” weighed heavily. These issues still matter deeply in contemporary Spain.

The Spanish Transition spans the period between 1975 and 1982, that is, between the death of Franco and the victory of the Spanish Socialist Party (PSOE) in democratic elections. During this period, Spaniards voted in their new Constitution (1978) by referendum. Various free and competitive national and local elections took place with the victory of the now-disbanded

UCD, a party which included the most progressive sectors of Francoism. Despite a right wing backlash in 1981 when a sector of the army almost succeeded in a coup d'état, by 1982 the PSOE had obtained a clear and absolute majority and went on to govern Spain for more than 15 years. In retrospect we can see that this was a decisive moment for Spanish democracy.

If we accept 1982 as the key year in the consolidation of Spanish democracy, we can see that the end of the Spanish Transition was soon followed by democratic transitions in the countries of Central and Eastern Europe. This began with the great rallies led by Solidarność in Poland. The fall of the Berlin Wall marked the beginning of the end of the artificial division of Europe into two blocs and, in particular, the control of *Mitteleuropa* by the totalitarian regime of the Soviet Union.

The media has rightly played a vital role in the political, cultural and social life of Spain, both during the Transition and beyond. In many ways the media has been a vital determining factor in the establishment of democratic culture and values. Audiovisual media, in particular, has been instrumental in the secularization of values among the Spanish people.¹

The regulatory framework of the media in Spain has undergone a long and complicated evolution which began in 1978 and continues to the present day. This must be considered in the context of previous legislation, which sought to control access to information during the Franco regime.

Article 20 of the 1978 Spanish Constitution enshrined, for the first time in more than 40 years, rights to freedom of expression and freedom of information. It established a series of constitutional and legal safeguards to effectively protect such rights, including the abolition of censorship. One of these safeguards was the creation of a Constitutional Court, whose remit includes the upholding and defense of citizens' individual rights as guaranteed by the Constitution.

Journalists were finally protected by a real and effective bill of rights. New media were able to emerge thanks to the protection of the above-mentioned provisions and the constitutional recognition of economic freedom.

That said, much remained to be done from a legislative point of view. Specific laws regulating the media had been approved during the dictatorship, for example the Press Law of 1966. By 1978, therefore, most of these regulations had become unconstitutional and as such inapplicable, although, in practice, some norms were still being enforced.

The Press Law of 1966 was considered a *relaxation* of the draconian rules established by a highly restrictive Decree approved in 1938, in the middle of the Spanish Civil War. However, the Law of 1966 still displayed an

¹ We must remember that, for almost fifty years, Spain was officially a Catholic country, with the very active presence of the Catholic Church in all areas of social and cultural life.

undemocratic and authoritarian legislative approach to freedom of speech issues, preserving some forms of censorship and maintaining much of the dictatorship's vast range of controls and powers. In 1977, two years after Franco's death (the de facto end of the dictatorship) and a year before the passing of the Constitution, the transitional government approved a couple of Royal Decrees dealing with communication issues. The first aimed to provide a greater degree of legal certainty in cases of defamation. It also introduced some limits on government powers to forbid the distribution of publications and directly abolished various aspects of the Press Law of 1966. The second transferred the control of media outlets belonging to the Movimiento, Franco's Fascist party and the only political association authorized in Spain during the preceding 40 years, to the transitional government.

We have broadly divided the evolution of the Spanish media landscape into three stages. The first spans the period from 1978 to 1994, the second from 1994 to 2004 and the third from 2004 to the present. We will succinctly analyze the role and evolution of broadcast media, the press and the Internet.

II. First Stage, (1978–94): Transitional and Socialist Governments

This first period² covers the passing of the Constitution by referendum in 1978, the emergence and consolidation of private television channels and the consolidation of two national newspapers: *El País*,³ which was launched in 1976 going on to become the most important left-wing newspaper in the country, and *El Mundo*,⁴ which erupted on the media scene in 1989 to challenge the hegemony of *El País* and to oppose the socialist government at the end of its third mandate.

It must be stressed that one of the first rulings taken by the Constitutional Court in 1981 on the issue of freedom of information confirmed the right of the government to privatize all press outlets that were still controlled by public institutions. Some of the journalists employed by these publications had challenged this decision before the Court, alleging that it curtailed their right to provide information to citizens. The basis of the Court's ruling was that the right of owners or managers (private or public) to transform, privatize or even quash media companies could not be impeded by invoking rights to freedom of expression.

² See, in particular, Isabel Fernández Alonso and Fernanda Santana Cruz, *Estado y medios de comunicación en la España democrática* (Madrid: Alianza Editorial, 2000).

³ *El País* was founded by José Ortega Spottorno, and the first edition was published on 4 May 1976. Its first director (until 1988) was Juan Luis Cebrián.

⁴ This newspaper appeared for the first time on 23 October 1989, and was founded by Alfonso de Salas, Pedro J. Ramírez, and Mechor Miralles, among others. The publisher, Unidad Editorial SA, is majority owned by the Italian media group RCS Media Group (Rizzoli).

A. The Broadcasting Industry

As in most European countries, the broadcasting industry operated as a state-run monopoly, managed according to democratic principles. However Radio y Televisión Española (RTVE) was a public corporation directly controlled by the dictatorship. Along with No-Do (Noticiarios y Documentales [News and Documentaries], a state-controlled series of cinema newsreels produced in Spain from 1943 to 1981), it used propaganda and censorship to promote the “voice of the regime.”

In 1980 the Spanish Parliament approved the first fully democratic law regulating broadcast media. Law 4/1980 of 10 of January was central to Spanish media structures until 2010, when it was formally derogated by the new Audiovisual Communications Law, now in force.

Law 4 formally established a state monopoly over television broadcasts. Only RTVE was allowed to provide television services to Spanish citizens, whereas in the field of radio services, the law endorsed the previous status quo in that public and private entities (concession holders) already in the market were permitted to retain their positions.

The public corporation RTVE was managed and controlled by a board of directors selected by parliament, with proportional representation of political parties, and headed by a director general with wide-reaching powers who was directly appointed by the government. Despite the fact that RTVE basically represented the voice of the government, that Spain was still a fledgling democracy and that the government-appointed director general was a key figure, RTVE allowed other political parties a remarkable degree of representation and participation. During this whole first stage, the role of public television and radio was extremely important and at times decisive.

Nevertheless the state monopoly on television broadcasting began to crumble in the early 1980s when some *autonomías*, that is autonomous communities or regional governments, in particular those of Catalonia⁵ and the Basque Country,⁶ decided to create their own public broadcast media. Their main intention was to employ these media outlets to recover and promote the social use of Catalan and Basque languages (which had been suppressed by the dictatorship) and to forge a new “national” sentiment in territories which have distinctive cultures and histories. This initiative (subsequently adopted by other autonomous governments) involved overlaying state public service broadcasting with regional equivalents, creating a unique state of affairs within the European broadcasting scene. It is worth noting just how these

⁵ Law 10/1983 (30 May 1983), Catalan Parliament, for the creation of the Public Entity Catalan Radio and Television Corporation.

⁶ Law 10/1982 (3 May 1982), Basque Parliament, for the creation of the Basque Public Radio and Television Company.

new channels were sanctioned. In 1983, the Spanish Parliament passed the Law of Third Channels (RTVE already had two national channels), according to which public service “regional” broadcasters had the right to broadcast television as long as they were granted a concession by the government. Therefore, despite the fact that, from a constitutional point of view, the Catalan, Basque and other governments could have assumed powers to establish and to manage their own autonomous public service broadcasting, this law ensured that authorization had to be granted by central government and was in no way automatic. In this sense Spain managed to maintain some degree of central control over broadcasting alternatives aimed at specific groups united by region, language and/or culture.

However, the most important debate at that time concerned the need to allow *private* television outlets. Since the passing of Law 4/1980, a number of media companies had been arguing for the right to provide television services alongside national public service broadcasting. In 1982 the Constitutional Court intervened in this debate, ruling that the establishment of public monopolies was a question of parliamentary discretion and that there were no constitutional issues at stake regarding this matter. It considered that the perpetuation of the public monopoly did not necessarily violate the right to freedom of speech, provided that the public channels were characterized by considerable “internal pluralism.” This is only understandable when considering the trends of public media spheres in most Western European countries in the early 1980s. In fact, jurisprudence of the 1990s takes the opposing stance, extolling “external” pluralism through public licensing procedures that grant a diverse range of operators fair and nondiscriminatory access to the public sphere.

The public broadcasting monopoly ended in 1988 with the Law of Private Television (Law 10/1988), which allowed a limited number of private companies to broadcast nationally on the basis that even private television should be considered a public service. In theory this obliged private operators to obtain a public service concession and to undertake public interest missions and espouse public interest principles. It must be said, however, that this was a mere formality, to the extent that from 1990 right up until 2010 private television channels were at liberty to provide services and contents without any kind of government or regulatory supervision. Nevertheless, the consideration of free, over-the-air television as a public service only ended with the very recent law of 2010.

Concessions were granted in 1990 for two new public-access television channels with national coverage and a third encoded television channel, all transmitted by means of analog Hertzian airwaves. Despite the fact that it was officially an open, fair and competitive process, it is instructive to take a look at its outcome: One public-access channel went to an alliance between two conservative media groups—the national (now defunct) ABC Group, and the Catalonia-based Godó Group (Antena 3); the second went to a more com-

plex alliance between a Basque media group associated with Mediaset and—paradoxically—the National Association for the Blind (a very powerful private entity in Spain)⁷ (Tele 5); and the encoded channel was awarded to an alliance between the Prisa Group (*El País*) and the group of Canal+ France (Canal+).⁸

The radio sector commanded large audiences in Spain and had a great deal of influence during this period. Law 4/1980 consolidated the position of the private radio stations in existence before the transition to the detriment of the national public radio stations, although regional public broadcasters were thriving. Prisa Group, already influential, bought up all shares, including those which had been state owned, in the principal private radio station, the Ser Group. With ownership of *El País*, the securing of a license for the private television channel Canal+, and now control of the Ser Group, Prisa became the leading media group in Spain.

B. The Press

With the removal of all legal impediments to publication the press became in the 1980s a central element of the Spanish public sphere. As we have already pointed out, press outlets which had been in the hands of the state were privatized. We have highlighted the emergence and consolidation of the Prisa Group, the publishers of *El País*. This group progressively came to occupy a leading, and at times hegemonic, position in Spain, directly supporting the democratic transition as well as indirectly supporting successive socialist governments led by Felipe González. The existing Spanish newspapers, historically very politicized, now faced competition from *El País* and a wider range of opinions and viewpoints began to emerge. It is also important to note the consolidation of a variety of regional newspapers with large circulations in various autonomous regions. In 1989, the self-styled “liberal” newspaper *El Mundo* emerged to take on the socialist hegemony, exposing cases of corruption and political scandals which plagued the government from 1992 until its defeat. This newspaper ousted the more conservative press and came to challenge the preeminence of the *El País*.

⁷ In this period, ONCE (Organización Nacional de Ciegos Españoles/National Association for the Blind) achieved a significant level of spending power due to income derived from lotteries. As a result, it managed to gain and maintain a leading position in Spain.

⁸ It would be instructive to study the alliances of the Spanish socialists with the French and the Italians, and the relationship of both with the owners of the respective media groups who won two of the three bids. President Mitterrand awarded Canal+ of France to the Havas Group. The first president of Canal+ from 1984 to 1995 was André Rousselet, Mitterrand's former cabinet director. In Italy, the relationship with and support of Prime Minister Bettino Craxi (PSI) by the president of the group Mediaset, Silvio Berlusconi, was widely known.

To sum up, during this period of democratic consolidation, the media matured within a framework of increasing freedom of speech, publishing outlets multiplied, private commercial radio stations overtook public ones, people living in regional autonomies began to have a choice over which “national” public service broadcasting operators best served them and, in some cases, in which language, and finally the state monopoly on public television was decisively broken. Public media ceased to reflect the singular voice of the regime and came to give voice to many, achieving a remarkable degree of journalistic impartiality and professionalism within a relatively short period of time.

III. Second Stage (1994–2004): The Socialist Defeat and the “Aznar Governments”

The ten-year second stage period covers the last two years of the final PSOE government led by Felipe González and the two subsequent conservative governments led by José Maria Aznar. It must be remembered that Aznar’s Partido Popular (PP), which took office in 1996, succeeded Fraga Iribarne’s Alianza Popular (AP), which, in the first half of the Transition (1977–79) was the right-wing party most identified with the ousted Franco regime. During eight years of political and sociological “Aznarism”—a politically conservative, economically liberal stance similar to UK and US free market models and a far cry from European Christian-Democrat traditions—the PP managed to make gains throughout most regions of Spain. The PP’s mandate was characterized by its decision to position itself alongside President George

W. Bush’s decision to invade Iraq in 2003, to stir up Spanish nationalism in the Castilian mould and to bait autonomous regions with other loyalties in terms of “national” identity. It even managed to incorporate some center-right regional parties, with the obvious exception of the center-right nationalist parties in Catalonia and the Basque Country.

The last government of Felipe González was not able to see out its mandate, lacking a parliamentary majority, and was discredited by grave corruption scandals. In this swing to the right, the media played a determining role,⁹ favoring a PP victory.

⁹ See the chapter on the role of the media in the fall of the fourth government of Felipe González in M. Castells, *Comunicación y poder* (Madrid: Alianza Editorial, 2010); see also M. A. Iglesias, *La memoria recuperada. Lo que nunca han contado Felipe González y los dirigentes socialistas* (Madrid: Aguilar, 2003); A. S. Palomares, *Felipe González. El hombre y el político* (Barcelona: Ediciones B, 2005); J. García Abad, *Las mil caras de Felipe González* (Barcelona: La esfera de los Libros, 2006); E. Ekaizer, *Vendetta* (Madrid: Plaza y Janés, 1996).

The Aznar government encouraged the consolidation of kindred media groups and hindered those close to the previous socialist governments. The Prisa Group found itself under attack, and those close to the PP even attempted to get their then-president, Jesús de Polanco¹⁰ imprisoned. During this period, *El Mundo* and the media group Unidad Editorial, along with the multimedia group Planeta, became the groups closest to the new right-wing government, to the detriment of other groups. In both cases, strangely, shares in these groups were owned by Italian companies, such as Rizzoli and De Agostini, reinforcing the presence of Italian media groups alongside Mediaset (which controls the private television channel Tele 5).

A. The Broadcasting Industry

This industry experienced the “war between satellite broadcasting platforms” in a very particular way. The provision of satellite television services was liberalized in 1997. The Aznar government (under the auspices of the still partially state-owned telecommunications company Telefónica) managed to launch a second satellite broadcasting outlet. This was intended to promote competition with the satellite pay television outlet Canal Satélite Digital, partly owned by the Prisa Group,¹¹ with the aim of reducing the Prisa Group’s leadership in the field of media communications. The acquisition and control of the broadcasting rights of, among other things, football matches, generated great tension between Canal Satélite Digital (Prisa) and Vía Digital (Telefónica). In 1997 the Aznar government intervened, attempting to legislate technical parameters which would favor the position and interests of Vía Digital. The fierce competition between the two platforms involved significant financial drains on both groups. Telefónica finally threw in the towel and divested itself of Vía Digital which was absorbed by Canal Satélite Digital in May of 2002, creating a new platform called Digital+. This “war” between satellite platforms resulted in reduced investment in systems of cable television broadcasting. At the end of this period, Prisa achieved control of both pay television and the management of broadcasting rights, but it cost them dearly in terms of time, money and effort.

Private television stations Tele 5 and Antena 3 remained under the control of Mediaset (Tele 5) along with Planeta, De Agostini and Telefonica (Antena 3). Prisa and Canal+ France retained control of the encoded Canal+. Public television broadcasting (RTVE), pressured politically by the Aznar

¹⁰ J. Prieto, “La Guerra de Aznar contra PRISA,” *El País*, 24 March 2007.

¹¹ Isabel Fernández Alonso, “La política de televisión por satélite en España (1995–2003),” *Revista de estudios para el desarrollo social de la comunicación* 1 (2004): 135–45.

government, went in a very commercial direction and this period saw fierce criticism of public state television.¹² Various autonomous regions (and some municipalities) followed the examples of Catalonia and the Basque country by creating their own public channels, as provided for in the new Law of Local Television of 1995.¹³ The credibility of publicly owned media was seriously damaged on two counts: firstly, their political sectarianism (resuming their role as voice of the regime) became increasingly apparent and, secondly, their financing arrangements (entering into direct competition with private television stations for advertising revenue) were called into question.

In 1995 a law regulating cable broadcasts¹⁴ was approved for the first time. In 1994 a Constitutional Court decision had ruled that, until a regulation in this area was approved, public institutions were not allowed to prevent any citizen from providing cable television services. In such cases, freedom of speech should prevail. The new law establishes a possible duopoly in the provision of cable services in different areas or regions of the country, declaring as well that cable television as a whole should be considered a public service. This situation remained as such until the full liberalization of telecommunications in 2003. However, the provision of cable audiovisual services is still in the hands of very few actors in Spain, with very low levels of penetration, basically due to the lack of attention paid by media policies to this specific distribution system.

A parliamentary initiative to create an independent audiovisual regulatory authority in 1995 failed to gain a majority vote.

B. The Written Press

Although *El País* maintained its leadership position, *El Mundo* consolidated its position as the second most important national daily, increasing circulation at the expense of both the leftish *El País* and the traditionally right-wing *ABC*. The regional press maintained a strong readership in their territories, especially the communication groups Godó, Vocento, Grupo Zeta and Prensa Ibérica.

In 1998, the group Planeta De Agostini introduced a new, rather conservative national newspaper—*La Razón*. During this period the national press became ever more politicized, although this is not necessarily the case in respect of regional or local newspapers.

Despite the appearance of the Internet and the first digital editions of written media, these papers continued to publish print editions and made, in most cases, considerable profits.

¹² A. G. Montano, *La manipulación en televisión* (Madrid: Espejo de Tinta, 2006).

¹³ Law 41/1995 (22 December 1995), on Local Television by Terrestrial Waves.

¹⁴ Law 42/1995 (22 December 1995), on Cable Telecommunications.

To sum up, during this stage the private television stations were consolidated to the detriment of the public ones, with the latter losing both credibility and status due to their increasing sectarianism and commercialization. The Aznar government's attempts to unseat the Prisa Group from its leading position in Spain did not succeed, although the group was seriously debilitated. Likewise, the Italian communication groups Mediaset, Rizzoli and De Agostini reinforced their presence in Spain.

IV. Third Stage (2004): The Socialists' Return to Power

In the run up to the 2004 general election everything appeared to indicate that the PP, led by Aznar's successor Mariano Rajoy, would win a third term. However the public reaction to terrorist bombs in Madrid of 11 March,¹⁵ or rather to the PP's stage managing of a national tragedy to benefit themselves politically, changed the political landscape almost overnight. In the days following the brutal attacks Aznar declared, and went on declaring, that the Basque terrorist group ETA were responsible. In fact, between the 11th and the 14th, the day of the general election, the PP deliberately withheld information which conclusively pointed to the involvement of radical Islamic groups and knowingly lied to the public. Public reaction to this manipulation of information was a wave of anger toward the PP and Aznar. This resulted in a huge electoral turnout and a victory for the PSOE, led by the young and almost unknown Jose-Luis Rodríguez Zapatero—a situation that had been unthinkable only a week before. The PSOE returned to power after several years of internal crisis and a radical change of leadership and direction. Zapatero had won the leadership of the PSOE only two years before, ousting the old guard of Felipe González and heading a new generation of young and radical socialist leaders.

The new president of the government promoted a reform of the public media with the creation of a Commission of Experts¹⁶ and with new broadcasting laws. On the other hand, his lack of "connection" with the Prisa Group, historically linked with the center-left, led to the promotion of a new media group, currently called Imagina Media Audiovisual, promoted by Mediapro and the Arbol Group. In 2009, the whole broadcasting industry began to undergo major upheavals, sparked by both the international economic crisis, which hit Spain especially hard, and by the chaos caused by the digitization of information and the full-blown invasion of the Internet.

¹⁵ The attacks of 11 March 2004 were a series of terrorist attacks on four trains in Madrid. This was the worst attack ever committed in Spain, with ten near-simultaneous explosions on four trains; 191 people died and 1,858 were wounded.

¹⁶ In the year 2004, the Council for the Reform of the State-Owned Media was created; it presented its proposal for reform in the year 2005.

A. The Broadcasting Industry

The Report of the Commission of Experts instigated an in-depth reform of public state television, brought about by means of a new law¹⁷ passed in 2006. For the first time in Spain, the director general would no longer be appointed by the government but rather elected by Parliament. Public television's commitment to public service and the manner of its financing were very precisely laid out. This law became key to building a pluralistic and high-quality public television service in line with other European public television services, ensuring that it would be at the service of the general public and not at the service of the ruling government. Only two years later the government superseded this law with Law 8/2009, of 28 August, regulating the financing of the Spanish Radio and Television Corporation and suppressing advertising as of January 2010. This amendment can only be understood if we bear in mind the strong influence that the lobby of the national private broadcasters (UTECA) has historically had on different governments, including the Zapatero government. After all the attention paid to the reform of national public service broadcasting, UTECA asked for compensation in the form of restrictions on RTVE's ability to compete for advertising revenue. The ruling majority then decided to emulate the French system, in which public service broadcasting funds are raised from license fees paid by the public and some special taxes paid by private broadcasters. In the case of Spain, taking into account the lack of precedent for the paying of fees by consumers and the pending European Commission challenge to the taxes imposed on telecommunications service providers, the new system remains extremely uncertain and the current financial situation of RTVE is critical.

A fourth license for free, over-the-air, analog television was awarded in 2004 to the group Arbol-Mediapro (La Sexta) after a change in the Law of Private Television. This group has a radical left-wing editorial agenda. Its creation was promoted by Zapatero himself in order to prevent the Prisa Group from wielding exclusive influence or exerting excessive pressure on the communications landscape. To "compensate" for this decision, the government simultaneously decided to relax the conditions of the concession granted to Canal+ in 1990, allowing it to provide its services free, over the air, with no codification system under the new commercial brand of "Cuatro." Prisa was now able to broadcast its pay television systems through the Digital+ satellite platform and to have a free, over-the-air television channel at the same time.

Arbol-Mediapro had progressively achieved the lion's share of football broadcasting rights at the expense of the Prisa Group, hence the eruption of a second "football rights war" in the middle of the last decade. This time the warring groups were both close to the government and the issue is still in the

¹⁷ Law 17/2006 (5 June 2006), for public radio and television.

hands of the courts. Felipe González, noting the fraternal nature of the conflict, denoted it “friendly fire.”¹⁸

This period was also marked by the migration toward digital terrestrial television (DTT). In fact, despite constant legal improvisation, this new system of digital public-access television was fully completed on 1 April 2010 and analog TV dismantled. The number of public-access television channels has increased to over 40, but the media groups that transmit them tend to be the same ones. Each free, over-the-air channel obtained new licenses to broadcast digitally, multiplying their output four or eight times. It should be stressed that, although this represented a technological success, general opinion in the sector is that a broadcasting model with more than 40 public-access channels is unsustainable from an economic point of view, particularly at the local level. The increase of the number of channels has not involved a corresponding increase in the quality of contents nor a greater diversity. It should also be taken into account that the Spanish market for DTT was divided into three different levels: national, regional and local.

One important recent initiative has been the modification of criteria regarding the concentration of media holdings, using a legal instrument for urgent cases,¹⁹ and no general or detailed arguments to support such a government decision were provided. These amendments allowed an agreement between Mediaset and Sogecable (Prisa Group) by which the former would acquire the latter’s free, over-the-air channels.

This period has seen a significant rise in the level of political tension promoted by sectors of the media,²⁰ particularly those groups and outlets closest to the most right-wing section of the PP: the radio station owned by the Spanish Episcopal Conference (COPE), the newspaper *El Mundo* and its broadcasting group, and a new extreme right, almost fascist, media group called Intereconomía.

B. The Press

This sector and, in general, the whole of the media, has been undergoing a major crisis since 2009. The economic crisis has meant a drastic reduction in advertising revenue and the freezing or reduction of public funding. In addi-

¹⁸ *El País*, 22 September 2007. Felipe González’s statement about “the second football war”: “I am worried about the friendly fire, collateral damage and other absurd things that we are experiencing.”

¹⁹ Royal Decree-Law 1/2009 (23 February 2009), for urgent measures with regard to telecommunications.

²⁰ *Report on Democracy in Spain, 2007: The Strategy of Tension* (Madrid: Fundación Alternativas, 2008).

tion, the multiplication of television and radio offers and, above all, of the new media—or digital editions on the Internet—has meant greater distribution and diversity and significant fragmentation of the audience. The fall in circulation figures clearly involves a corresponding fall in advertising revenue. Furthermore, as in other countries, the lack of certainty regarding future scenarios for the restructuring of the sector and doubts about whether individual outlets will survive make it difficult to plan. The majority of groups have been obliged to restructure and to reduce staff costs.

V. A New and Complete Audiovisual Media Law

As we have seen, since the Law of 1980, Spanish media legislation has been ad hoc, characterized by a high degree of fragmentation, a lack of coherence and little long-term vision or planning. Many laws and rulings give the impression of rather kneejerk responses to specific and short-term political circumstances and to pressure coming from powerful media companies. The close relationships between political parties and media groups allow media groups to act as key players in setting the political agenda.

Given this, it has been virtually impossible for any of the administrations that have governed over the last 30 years to draft a comprehensive and coherent audiovisual media law in order to regulate the sector as a whole. Bearing in mind Spain's recent history of conflict and dictatorship, the task of drafting a law that transcends special interests and rigid political contexts is extremely complex. It is vital to remember that, because the full enjoyment of freedom of expression and information is relatively recent in Spain, the media sector tends to use accusations of censorship to resist any legislative intervention that would regulate and supervise media companies' activities.

After endless negotiations between the government and UTECA behind closed doors, all other relevant players having been literally excluded, Parliament debated and approved Law 7/2010 (31 March 2010) on Audiovisual Communications. While it is impossible to summarize all the provisions included in this law, it is worth pointing out some of its major trends.

First of all, and according to the Spanish constitutional system, this is a "basic" law. This means that the its aim is to set general principles for the regulation of the audiovisual sector at the national level, leaving some leeway for the regions (autonomous communities) to develop and introduce specific provisions concerning media outlets that fall under their remit (that is, to say, regional and local media).

Secondly, Law 7/2010 attempts to incorporate European Law (Directive 2010/13/EU of the European Parliament and of the Council on the provisions laid down by law, regulation or administrative action in member states concerning the provision of audiovisual media services) into Spanish

domestic Law. It has to be noted that this is a case of *de minimis* transposition: the Spanish legislator does not go beyond the basic rules established by the European legislator and therefore in some cases the legal text becomes somewhat vague and definitely difficult to interpret and to enforce.

Thirdly, apart from the above-mentioned content regulations, other provisions concerning duties and responsibilities of audiovisual service providers seem to be inspired by a “light touch” legislative approach, establishing very low levels of public intervention in areas like concentration limits, licensing terms and conditions, and legal liability. In fact, in many ways, the law appears merely to formalize and preserve the previous status quo, thereby favoring the interests of big incumbent operators.

Last, but not least, the Law established CEMA, the State Council for Audiovisual Media, as the independent regulatory authority in this field. It is important to remember that Spain was probably unique in Western Europe in lacking this kind of body at the national level: for more than 30 years the Spanish “regulator” has been an administrative office within the Ministry of Industry. This situation was problematic in that the audiovisual public sphere was not actually regulated. The administrative office ostensibly responsible for regulation was neither politically independent nor professionally prepared to undertake important and delicate decisions related to the audiovisual media market. The final outcome has been an almost complete lack of regulatory intervention, at least at the national level.

Legal provision for the creation of an independent audiovisual regulating body (the telecom regulator, CMT, had already been established more than a decade before) is an important innovation established by the new legislative framework. However, more than a year on, CEMA is still not up and running and its members have yet to be appointed. The main reason is that the CEMA has disappeared from the Spanish institutional system before its creation. Indeed, Law 3/2013 has created a new “convergent” entity: the National Commission for Markets and Competition, a mega-regulator which embraces almost all economic sectors subjected to some kind of regulatory intervention: energy, telecommunications, audiovisual, postal services, railways, . . . including also within the scope of the authority the ex-post competences in the field of competition. This new regulator will probably start its activities by the end of 2013, representing a new, unprecedented and intense model of converged regulation.

It is well worth noting that some regions, like Catalonia, have been developing their own audiovisual media regulatory framework since 2000. The Catalan Parliament has approved three major laws that try to establish the basic pillars of audiovisual media regulation in this region: the creation of the Catalan Audiovisual Council (CAC); the approval of a complete and coherent legislative framework regulating content, ownership, licensing processes; and,

of course, the protection of local culture and language, and the consolidation of the Catalan Corporation for Audiovisual Media (CCMA) as the “national” public service broadcasting outlet for residents of Catalonia.

The CAC has become a good example of an independent regulatory body (at least within the context of Southern Europe) that has full decision-making powers over various audiovisual media sector issues: licensing, supervision of public service media (including the nomination of the members of the board of CCMA), media concentration (Catalan legislation has a more public interest-based approach to this issue), and, of course, content regulation. Members of CAC are nominated by parliament following detailed procedures, which originally included a proposal made by at least three political groups, a public parliamentary hearing of the candidates and a final vote agreed by at least two-thirds of the chamber. It must be stressed that during the last ten years most members of CAT had been nominated with the unanimous vote of parliament.

It has to be noted, however, that a reform approved in 2012 has recently changed this original and pluralistic scheme in order to reduce the number of members of the CAC and to make possible a nomination by majority, without the support or consensus of opposition parties. This significant step backwards has elicited criticism and eroded many of the traditional existing safeguards in terms of protection of pluralism within the Catalan public sphere.

VI. Conclusions

Since 1978, Spain has managed to consolidate a liberal and democratic political system, a situation further established by its entry into the European Union in 1986. Spain has been able to develop a liberal, social state under the rule of law, in which rights to freedom of speech and of access to information have been guaranteed. We must remember that Article 20 of the Spanish Constitution establishes the legal framework for the exercise of a range of freedoms—in whatever ambit—as a fundamental right (Art. 20). During this period the Constitutional Court has shown a tendency to rule in favor of freedom of information as a precept when constitutional rights such as the right to privacy, the right to honor or the right to one’s own image come into conflict with it. In this sense, it is noteworthy that the degree of freedom of speech and information achieved in Spain is equal or superior to that of other member nations of the European Union and it is basically in line with the doctrine established in this field by the European Court of Human Rights.

In this context, it seems necessary to state very firmly that freedom of speech and information is not under attack in Spain. On the other hand,

some reports,²¹ and the FESP²² itself, indicate that one of the specific threats to Spanish democracy is the manipulation of information and the violation of basic ethical codes of journalism. What is at stake is responsible and professional journalism, that is, the very right of citizens to receive accurate and objective information. Spain is experiencing a process of degradation of journalistic content. Some media, generally of the more extreme—or simply, the extreme—right, constantly flout the basic norms and ethical codes of professional journalism, using their position to agitprop in the service of specific political parties, pressure groups, economic interests or individual agendas. This is a phenomenon which unfortunately extends beyond Spanish borders and, it must be emphasized, infringes the constitutional obligation of accuracy. As Timothy Garton Ash rightly observed in 2010: “Because what the followers of Fox News in the United States say is, ‘Tunnel vision? Yes, please! Unfair and unbalanced? We love it that way!’ If anything, BBC-style impartiality is rather losing out to multiple partialities in media across much of the democratic world.”²³ The manipulation of information—the degradation of information caused by conflating fact and opinion—and, beyond a shadow of a doubt, discourses inciting hate and conflict represent a serious threat to freedom of speech and freedom of information.

In spite of the multitude of communication windows provided by the Internet and new information technology, it is clear that the media in Spain is experiencing significant concentration. One obvious example is the process by which the group Mediaset absorbed part of the broadcasting business of Prisa; another, the ongoing merger between Planeta De Agostini and Imagina Media Audiovisual; yet another, the acquisition of the group Recoletos—which controlled the leading economics newspaper, *Expansión*, and a sports newspaper, *Marca*, by Unidad Editorial (Rizzoli), as well as the progressive acquisition of local newspapers by a few companies.

In contrast, the complex public broadcasting system, distributed among the national, regional and local governments, as well as attempts by these governments to control the content of new output, still represents a clear threat to the consolidation of accurate and balanced information in Spain. In the last two years, the national public service broadcaster (RTVE) has achieved historically unprecedented levels of professionalism, independence and impartiality at a national level. While it is true that CCMA had met the same high level ten years before at the Catalan regional level, in most

²¹ *Report on Democracy in Spain, 2008* (Madrid: Fundación Alternativas, 2009).

²² Federation of Unions of Journalist in Spain. See the article by their Secretary General, E. Bastardes, “El camino hacia la libertad de información,” *Le Monde Diplomatique*, July 2005.

²³ T. Garton Ash, “Beyond Google’s Clash with China, We Must Find Rules for a Global Village,” *The Guardian*, 24 March 2010.

regions, the regional public service broadcasting media principally represents the sectarian voice of regional governments.

The return to power by the PP at the general elections of 2011 has negatively affected the management of information and threaten the impartiality of the RTVE. In April 2012, the Spanish government suddenly modified the regulations governing the board of RTVE, reducing the number of members and altering the nomination criteria. In this act it created the possibility to elect members to the board by absolute majority, instead of requiring two-thirds of the members of parliament. This put in the hands of the current ruling majority complete power regarding the nomination of individuals to the highest body regarding the definition and provision of psm at the national level.

During the last thirty years, it is obvious that successive governments have tried to favor media groups that were sympathetic toward, or in tune with, their respective political and ideological projects. This practice is not uncommon in other liberal democracies; the difference probably lies in the radical politicizing of the Spanish media and in their intention—and ability—to try to influence government decision-making. Nevertheless, we must not, under any circumstances, forget the essential role of the media, public or private, in the consolidation of Spanish democracy, and more generally, in the modernization of Spain.

Russia's Supreme Court as Media Freedom Protector¹

ANDREI RICHTER

I. Introduction to the Procedure for the Adoption of Resolutions by the Supreme Court

In June 2010, Russia's highest court adopted for the first time in its history a coherent interpretation of relevant case law in relation to the mass media, editors and journalists.

To recall some of the background, according to the Constitution of the Russian Federation (Art. 126)² the supreme judicial body for civil, criminal, administrative and other cases under the jurisdiction of common courts is the Supreme Court of the Russian Federation (hereafter, "the Supreme Court"), which among other duties shall "provide explanations on the issues of court practice." According to V. V. Demidov, at the time secretary of the plenary meeting of the Supreme Court of the Russian Federation and meanwhile retired, such explanations represent a "specific form of court precedent." They generalize on the approaches and current trends developed by the case law for a specific category of civil or criminal cases and are based upon the experience and knowledge of the judges, practicing attorneys and legal scholars. Styled as precise explanations, they differ from commentaries published by legal scholars and experts inasmuch as the latter are mostly

¹ This chapter is an updated version of the author's article "Russia's Modern Approach to Media Law," first published in *IRIS Plus 2011-1: A Landmark for Mass Media in Russia* by the European Audiovisual Observatory in Strasbourg, http://wayback.archive-it.org/4015/20131105164634/http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus1LA_2011.pdf.en.

² The Constitution was adopted by popular vote on 12 December 1993. See <http://constitution.ru/> for the official translations of the Constitution into English, German and French.

based on the commentator's personal vision of how a particular norm should be interpreted. "Explanations that the Supreme Court adopted in its plenary meetings as resolutions become a guide that must be applied in order to rule in a lawful, well-grounded and just way," said Judge Demidov.³ These recommendations, although they are highly persuasive, are, however, not law per se. According to the Constitution, "judges shall be independent and submit only to the Constitution and the federal law" (Art. 120, para. 1).

The draft of the Resolution *О практике применения судами Закона Российской Федерации "О средствах массовой информации"* (On Judicial Practice Related to the Statute of the Russian Federation "On the Mass Media") was developed since 2009 by a working group of the Supreme Court of the Russian Federation headed by deputy Chief Justice Vladimir Nechaev, with Vyacheslav Gorshkov serving as Judge-Rapporteur. In December 2009, five "external" experts in media law were brought into the group.⁴ The expanded team met about a dozen times to discuss amendments to the draft.

In spring 2010 the final draft was approved by the working group, then by the Council of Legal Scholars and Experts (a permanent body of the Supreme Court), and thereafter sent out to the regional courts, interested public bodies (the prosecutor-general, the administration of the president of the Russian Federation, the Ministry of Justice, the Ministry of Communications and Mass Communications, and the Federal Service for Supervision of Communications, Information Technologies and Mass Media), legal research institutions and colleges, key mass media outlets, etc. Their representatives were invited to participate in the discussion of the draft held on 20 April 2010 at the plenary meeting of the Supreme Court. At the plenary meeting the text was approved by a formal vote, but—in order to take into account a number of suggestions presented by speakers at the session—an editorial group was formed comprising the speakers and the key working group members. This group was assigned to find a consensus. After about another dozen meetings of the group the consensus was found and at the plenary meeting, on 15 June 2010, all 78 judges of the Supreme Court, who were present,⁵ unanimously approved in a point-by-point vote the final text of the Resolution that was subsequently published in the official gazette, *Rossiyskaya gazeta*, on 18 June 2010.⁶

³ Interview of Judge V. V. Demidov to correspondent of journal *Advokatskie vesti* (Адвокатские вести) K. Lisukova (publication date unclear, most likely released in 2004). See the official website of the Supreme Court at http://www.supcourt.ru/print_page.php?id=740.

⁴ Dr. Yury Baturin, Dr. Mikhail Fedotov, Dmitry Golovanov, Viktor Monakhov, and this author.

⁵ The Supreme Court is composed of 125 judges who meet for cases in "chambers."

⁶ Постановление Пленума Верховного суда Российской Федерации "О практике применения судами Закона Российской Федерации 'О средствах массовой информации'".

II. Foundations of the Media Regulation

The Resolution of 15 June 2010 No. 16 “On the Judicial Practice Related to the Statute of the Russian Federation ‘On the Mass Media’” (hereafter, “the Resolution”), adopted by the Supreme Court, sets out the important political and legal principle that the “freedom to express opinions and views and the freedom of mass information are the foundations for developing a modern society and a democratic state,” thus underlining the place and role of the free media in the system of institutions and values of the Russian state. Courts should take this principle into consideration in all cases in which this freedom is challenged in the name of values that are not really the foundations for developing democracy in the Russian Federation, such as public morals or the reputation of citizens and companies.

Limitations on the freedom of mass information, as the Resolution reminds, are admissible exclusively if imposed by a federal statute and cannot be introduced by any other legal act. The Supreme Court refers here to the provisions of Article 55, para. 3, of the Constitution of the Russian Federation, which stipulates that the rights and freedoms of a person and citizen may be limited only by a federal statute to the extent necessary to protect the foundations of the constitutional system, morals, health, rights and legal interests of other persons, and to defend the country and the security of the state.⁷ Therefore, if judges are adjudicating on the question whether or not media professionals may be exposed to liability charges, the judges are instructed to verify possible limitations on the right to freedom of information of the media professionals are indeed covered by a federal statute (and not solely, for example, by regional statutes, decrees of the president or governmental resolutions).

The Resolution enumerates international covenants that regulate freedom of expression and freedom of mass information and are binding for the Russian Federation. In this regard the Resolution steps out of routine by referring the Russian courts not only to the relevant provisions of the International Covenant on Civil and Political Rights and the European Convention on

информации” No. 16. (Resolution of the Plenary of the Supreme Court of the Russian Federation “On the Judicial Practice Related to the Statute of the Russian Federation ‘On the Mass Media’” No. 16.) See the Russian text at <http://www.rg.ru/2010/06/18/smi-vs-dok.html>. An official English translation is available on the website of the Supreme Court at http://www.vsrfr.ru/vscourt_detale.php?id=6786 and http://www.vsrfr.ru/vscourt_detale.php?id=6787. A clearer unofficial translations into English, French, and German are available as part of *IRIS Plus 2011-1*, see footnote 1.

⁷ This article of the Constitution in its turn follows the official Russian translation of the European Convention on Human Rights where the word “law” (e.g., in Articles 5–12) was somewhat narrowly interpreted as “закон”, or “statute”.

Human Rights but also to the rarely recalled Final Act of the Conference on Security and Cooperation in Europe (CSCE) and the CIS Convention on Human Rights and Fundamental Freedoms.⁸

III. Censorship

An important place in the Resolution is taken by the Supreme Court's commentary on the provisions in the Statute of the Russian Federation "On the Mass Media"⁹ (hereafter, "Statute on the Mass Media") that refer to the ban on censorship. Although in general the Resolution's statement is trivial the text provides some curious nuances.

The courts are reminded that according to Article 3, para. 1, of the Statute on the Mass Media censorship is the demand made by officials, state bodies, or local self-government bodies, organizations or public associations that the editorial office of a mass medium or its representatives (in particular the editor-in-chief or his/her deputy) obtain from them prior approval for the publication of messages and materials (except for cases when the official is an author or interviewee), as well as for the suppression of the dissemination of messages and materials¹⁰ or separable parts thereof.

The Supreme Court notes that officials have indeed the legal right to demand that their prior approval be given, when the subject matter to be disseminated consists of their own materials or interviews given to journalists. By contrast, the law does not foresee a corresponding obligation of the journalist to obtain prior approval for disseminating this type of information. Therefore, the Supreme Court's message is that while such a demand is not an act of censorship, a journalist's refusal to provide the transcript for an advance agreement on it is not punishable by law. This is important for court cases on the content of media materials disseminated on the basis of interviews because the Supreme Court's reading of the provision allows the editorial offices to edit interviews independently (under the condition that they do not violate copyright law). This rule is even more evident if a journalist makes his own story based on the interview without "distortion of its meaning and the words of the interviewee."

⁸ See "Commonwealth of Independent States: Convention on Human Rights" by Andrei Richter in *IRIS* 1995-6: Extra, <http://merlin.obs.coe.int/iris/1995/6/article100.en.html>.

⁹ Statute of the Russian Federation "On the Mass Media" N 2124-1 of 27 December 1991.

¹⁰ The law does not define what it understands by "messages" and "materials". It appears, however, that messages are meant to be texts or speeches while materials can be visual and therefore refer to videos, photos, etc.

According to the Supreme Court it is a different question under what conditions the founders of the mass medium (whose status resembles in many ways that of owners of the media outlet in the West)¹¹ may lawfully demand that its editorial office or its editor ask for their prior approval on messages and materials that they intend to disseminate. The answer depends on whether or not the editorial charter or a separate agreement between the founder and the editorial office (that under certain circumstances replaces the editorial charter) foresees this possibility. The Supreme Court concludes that, in the absence of such a provision, any interference by the founder with the professional independence of the editorial office and the rights of a journalist is illegal.

The Resolution explains that despite a general ban on censorship stipulated by Article 29 of the Constitution of the Russian Federation, Arts. 56 and 87 of the Constitution allow for a possibility of limiting freedom of mass information as a temporary measure in case of a state of emergency or the martial law (although these articles do not specify that censorship is indeed such a measure). In these cases censorship can be imposed and enforced following the procedure established by the Federal Constitutional Statutes¹² "On the State of Emergency" and "On the Martial Law."

IV. Title of the Media

The Resolution indicates that the title of a media outlet is not a statement as such, since "its function is essentially to identify the given media outlet for its actual and prospective audience." Therefore the title may not be evaluated in court as to whether or not it reflects the "real state of affairs." Thus a refusal to register a media outlet based on the fact that its title does not reflect the "real state of affairs" is illegal. This clarification closely follows the judgment of the European Court of Human Rights in the case of *Dzhavadov v. Russia* (Application no. 30160/04, 27 September 2007).

The Supreme Court adds that a court may still evaluate the title of a media outlet regarding the presence or absence of an abuse of the freedom of mass information in the terms of Article 4, para. 1, of the Statute on the Mass Media. For example, the title shall not contain appeals to exercise terrorist activities, advertising for pornography or the cult of violence and cruelty (all listed in Article 4 as abuse).

¹¹ For further details on the nature of the founders, see *IRIS Special 2010-1: The Regulatory Framework for Audiovisual Media Services in Russia*.

¹² Federal Constitutional Statutes have a higher status than Federal Statutes; they are adopted following a more complex procedure and may not be vetoed by the president of the Russian Federation.

It goes on to discuss cloning of titles of mass media (i.e., titles of channels and the programs within a channel's schedule) and in particular court cases where the plaintiff argues that his media outlet was denied registration on the grounds of Article 13, para. 1, subpara. 4, of the Statute on the Mass Media (when a mass medium with the same form of dissemination of mass information has already been registered under the same name). The Supreme Court reminds the judges that the statute refers to cases in which the titles are identical. Therefore a refusal to register the media outlet on the grounds that the new title is confusingly similar to a title already registered is illegal. Thus Roskomnadzor,¹³ the registration body of the executive branch, is denied the right to rule on similarity of titles.

The Supreme Court also addresses the problem of similar titles, which is quite widespread in the Russian media. It confirms that the use of mass media titles that are similar to the extent that they can be confused with each other may mislead the audience. In that case the protection of the persons holding the rights to the title of the mass media is enforced by the means foreseen by the existing legislation. Thus, without being explicit, the Supreme Court most likely refers to Part 4 of the Civil Code of the Russian Federation¹⁴ dealing with the regulation of intellectual property and to the Federal Statute "On Protection of Competition."¹⁵

V. Regulation of Online Media

The Supreme Court made a bold (though in a way short-lived) step and tailored the norms of the Statute on the Mass Media, which was adopted in 1991 and hence before the phenomenon of the Internet had come to Russia, to the social relations that characterize the virtual world and that require a legal framework. Neither has the text of the Statute on the Mass Media been amended to take into account these new relations, nor was a special statute addressing Internet-related legal issues ever adopted. As a result the legal framework for interactive and online services was quite unclear and allowed for different interpretations of the potentially applicable norms. The Supreme Court proved its courage in applying the logic of the Statute on the Mass Media to the relations between the providers and users of online services.

¹³ Roskomnadzor is a Russian abbreviation for the Federal Service for Supervision of Communications, Information Technologies and Mass Media under the Ministry of Communications and Mass Communications.

¹⁴ Part 4 of the Civil Code of the Russian Federation N 230-FZ of 18 December 2006. See more on the law in "Transformation of Authors' Rights and Neighbouring Rights in Russia" by Dmitry Golovanov in *IRIS-Plus*, 2008-2, <http://merlin.obs.coe.int/iris/2008/2/article1000.en.html>.

¹⁵ Federal Statute "On Protection of Competition" N 135-FZ of 26 July 2006.

A logical construction based on Article 24, para. 2, of the Statute on the Mass Media led the Supreme Court to important legal conclusions. The main one was that websites were not subject to mandatory registration as they would be if they were to be considered mass media outlets. Thus the Resolution confirmed the legal tradition that has emerged in Russia in the absence of clear rules, namely that the registration of websites can be done on a voluntary basis only.

In 2011 Article 24 of the Statute on the Mass Media was abolished, and a new notion of the media was introduced into the law. One of the types of the mass media is now a “network publication,” or in fact an online media. The 2011 amendments abolished Article 24, and introduced the need for the “network publications” to register in order to engage in media-like activities.

If the registration takes place then the authors of online services acquire the status of journalists with all the rights and privileges foreseen by the Statute on the Mass Media. Many websites seek such registration because they want to receive accreditation with state bodies for their reporters. Denial of such registration became difficult because the Resolution stipulates as follows:

According to Article 1 of the Statute of the Russian Federation “On the Mass Media,” freedom of mass information includes the right of any person to found a mass media outlet in any form that is not prohibited by the law. Starting Internet websites and using them to periodically disseminate mass information is not banned by the law. Considering this and based on the comprehensive list of grounds to refuse state registration of a mass media outlet set out in part 1 of Article 13 of the mentioned Statute, the registration authority has no right to refuse the registration of an Internet website as a mass media outlet should its founder express the wish to obtain such a registration.

In other words, registration is not necessary but if requested it should always be provided.

On the other hand, if a website is registered as a mass media its staff bears the same responsibilities as journalists. The site itself is subject to the system of warnings from Roskomnadzor or a public prosecutor in cases of abuse of the freedom of mass information. Such warnings may eventually lead to the site being forced to close down as a media outlet, although in such a case it would probably be able to continue to operate as a regular website. These consequences deter many website operators who therefore refrain from requesting registration. The Resolution acknowledges that those who violate the law when disseminating information through Internet websites not registered as mass media outlets shall be subject to penal, administrative, civil, and

other liability under the legislation of the Russian Federation. However, they may not be subjected to the specific provisions foreseen by the legislation on the mass media among which are stricter penalties for dissemination in the mass media of extremist calls.

This leeway for online resources unregistered as media outlets was in a way removed by the State Duma, which adopted in 2014 important amendments to the statute "On information, information technologies and on protection of information". The new legislation forces owners of websites and web pages visited by more than 3,000 users daily to register with Roskomnadzor and imposes additional responsibility on them for verifying the accuracy and reliability of posted information, following election law, respecting reputation and privacy, restraint from using curse words, etc. Penalties for violations include high fines and blocking of websites and blogs. "These amendments put bloggers under *de facto* regulation of the law on the mass media and force all significant news websites to register as ersatz mass media outlets," then said OSCE Representative on Freedom of the Media Dunja Mijatović. "This is being done by imposing on the websites additional restrictions but providing no real privileges such as those enjoyed by the Russian media outlets. The amendments were reportedly caused by the urgent need to counteract terrorism in the country, but I am not aware of a case where additional registration requirements and high morale of online resources have been instrumental in stopping terrorists. I sincerely hope that the authorities would realize this as well as the transnational nature of Internet and repeal the amendments, which will lead to disproportionate restrictions on media freedom."¹⁶

The Resolution provided a vital clarification on the issue whether there was a need to obtain a broadcasting license to disseminate audiovisual programming online. The Supreme Court recalled that a broadcasting license was necessary if technical means for over-the-air, wire, or cable television and radio broadcasting are used to distribute the mass media output (Article 31 of the Statute on the Mass Media). It then considered that such technical devices were not used for disseminating mass information through websites. As a consequence, the Supreme Court concluded, a person who disseminated mass information online did not need to acquire a broadcasting license. This explanation removed the threat for online broadcasters that performing online commercial or nonprofit activities without a license might lead to administrative liability, which would have been the case had a license been deemed obligatory by law. Alas the relief did not last for long. In 2011 amendments adopted to Article 31 of the Statute on the Mass Media eliminated the condition to use over-the-air, wire, or cable means for broadcasting to be considered as such. They reformulated the notion of mass media output to include

¹⁶ "Attempts to overregulate Internet undermine free speech and free media in Russia, says OSCE representative", <http://www.osce.org/fom/117950>.

refreshing a website content and thus made it clear that a license is necessary to be obtained in dissemination programs online, if the broadcasts are based on a schedule.

Further on the Resolution reiterated that the provisions of Article 24, para. 2, of the Statute on the Mass Media referred to the applicability of the rules established for radio and television, but only where such rules were established by the Statute on the Mass Media. As the latter refrains from the regulation of advertising, the rules established by the Federal Statute "On Advertising" in relation to commercials in television and radio broadcasting did not apply to the Internet. This had been open to question with regard to the norms relating to the amount and time of advertising and bans or restrictions on advertising of certain types of goods and services (such as tobacco, alcohol or medical services). At the same time the Resolution mentioned that general rules on dissemination of advertisements in the mass media established by the Statute "On Advertising" should be applied to those websites registered as mass media outlets. Because there were no such general rules (with a minor exception for advertising to raise funds for shared construction of real estate), the Supreme Court probably referred to such basic principles of advertising as fairness and credibility of information.

A year later, in 2012, the parliament amended the Statute "On Advertising" to include a ban on advertising of alcohol products in Internet. In 2013 it imposed a total ban on advertising tobacco products. That made a strong blow on the financial sustainability of online news media.

The Resolution discusses the acute issue of who has the burden of proof in the case of alleged violations of the law occurring on the Internet. It points out that notary offices are allowed to provide assistance to those who intend to sue on online offences (but before they actually file a lawsuit) in securing the necessary proof. The notary offices may do so in particular by certifying the content of an Internet website at a specific moment in time if there are grounds to believe that it will become impossible or difficult to furnish proof in the future. The Supreme Court instructs the judges that they have the right to accept such proof in cases relating to the dissemination of information online.

The Resolution also recalls that in such cases evidence may additionally be secured by the judge because the range of proof that can be provided is not limited by law (Arts. 64–66 of the Civil Procedural Code of the Russian Federation). The question of when it is necessary to secure proof is a matter to be adjudicated while taking into account the following aspects: the nature of the petition made to the court and in particular the case's subject matter, the circumstances that require securing such evidence and the reasons of the applicant for requesting provision of proof. In pressing cases, when preparing the court hearing and during the hearing itself, the court (judge) has the right to examine (view) the proof on the spot.

An issue dealt with in the Resolution that enjoyed intense attention by the media is the liability of the “editorial offices” of registered Internet sites for statements made by readers/viewers on the website’s fora and chat pages. If this section of the website is not premoderated the editorial office of such an outlet can become liable only if it receives a complaint from Roskomnadzor or a public prosecutor that the content of a communication presents an abuse of the freedom of the mass media (Article 4 of the Statute on the Mass Media) and subsequently fails to amend (or delete) the communication and the communication has been judged to be illegal by a court. Here the Resolution draws a parallel between such fora and live broadcasts that do not make broadcasters liable in accordance with Article 57 (“Absolution from Responsibility”) of the Statute on the Mass Media.

At the stage of editing the draft resolution representatives of Roskomnadzor strongly objected to this reasoning. Their position was based on the argument that registration as a mass media outlet assigns the editorial office of an Internet site certain responsibilities. Among such responsibilities, the basic one is editing the information disseminated by the media outlet. The way in which this duty is performed directly relates to potential liability for violations of the Statute on the Mass Media, and in particular for dissemination of extremist speech. Roskomnadzor was worried about a possible hike in extremist materials, as well as materials that propagate pornography and the cult of violence and cruelty under the disguise of comments on the websites registered as mass media.

Soon after the adoption of the Resolution, on 6 July 2010, the head of Roskomnadzor issued Order No. 420 which approved “Rules for addressing requests concerning the prohibition of abuse of the freedom of mass media by material sent to the mass media and disseminated through information telecommunication networks, Internet included.” The Rules have been drafted in accordance with the Statute on the Mass Media, Regulations on Roskomnadzor, and the Resolution.

According to the Rules, if comments that appear on websites registered as mass media seem to abuse the freedom of mass media a Roskomnadzor official takes a screenshot of the questionable material and prepares a report, to which it adds a copy of the screenshot. Immediately thereafter Roskomnadzor sends to the mass media outlet a request suggesting to remove or to edit the material. The request is signed by the head of a Roskomnadzor department and is registered and formulated following standard internal rules.

The request is to be sent to the editorial office of the online media via email to the Internet address announced on their website (with a marker of notification of delivery), as well as via fax. The fact and time of the dispatch of the request must be documented. Compliance with the action suggested is checked one working day after the dispatch. In case the demand to remove the questionable material is not met or the performed editing does not result

in the removal of the elements of abuse of the freedom of mass media, an official warning to the editorial office is issued. The Rules have already been used on a number of occasions.

One may doubt the legality of some of the provisions of the Rules. To begin with, the 24-hour deadline is set neither in the Statute on the Mass Media, nor in the Resolution. The absence of any time reference in the law made it impossible for the Resolution to find a requirement for the mass media outlet to act "immediately" or "as soon as possible." Moreover, there is no obligation for a mass media outlet to indicate its email address on its website, to check its emails every day, or to have a fax machine. In response to this criticism raised by this author in an interview to the Deutsche Welle radio, the broadcaster received an inquiry from an assistant to the head of Roskomnadzor as to the time limits that exist in Germany for reacting to official complaints. In reply the station provided Roskomnadzor with a memo published on the website of both Deutsche Welle and Roskomnadzor.¹⁷ It indicated in particular that the normal practice in Germany for website operators was to have a grace period of a week in controversial situations when consulting lawyers might be necessary to come to a conclusion.

The Resolution abstains from giving guidelines on situations in which the editorial office of an online media are addressed not by public bodies and officials but by individuals who believe that their rights and legal interests were violated in comments disseminated via Internet fora and chats. Will the media outlet that ignores such a complaint be still exempt from responsibility? The discussion in the editorial group showed that the majority believed that the persons defamed should make use of their right to a refutation of the defamatory statements in the same fora and chats.

Research shows the case law on civil lawsuits in relation to defamatory comments in the forums became very controversial and required additional explanations.¹⁸ In fact it came in the amendments to the Russian Civil Code that take effect in October 2013. Under the new law in case of infringement upon reputation, privacy or right to use images, one shall be entitled to seek such remedy as removal of defamatory information or images of such a person from the Internet.

¹⁷ See the websites of *Deutsche Welle* (<http://www.dw-world.de/dw/article/0,,5915106,00.html>) and Roskomnadzor (<http://rkn.gov.ru/press/publications/news12554.htm>).

¹⁸ See Andrei Richter, "Comments on the Internet Media Forum: Law and Practice in Russia," in C. Moeller and M. Stone, eds., *2013 Social Media Guidebook* (Vienna: OSCE Representative on Freedom of the Media, 2013), <http://www.osce.org/fom/99563>.

VI. Guarantees for Access to Information

The Resolution clarifies some issues concerning the access of journalists to information that is of public interest. The Supreme Court reiterates that information inquiry by the editorial office of a mass medium (Article 39 of the Statute on the Mass Media) is a legal means to seek information on the activities of state bodies, bodies of local self-government, state and municipal organizations (commercial and noncommercial), public associations, and their officials. The novelty of the explanation is that it explicitly puts both commercial and noncommercial public organizations under the obligation to provide information, while earlier the former were typically excluded for reasons of commercial secrecy.

One important instruction to the courts in relation to information requests is based on Article 38 of the Statute on the Mass Media, which stipulates that providing data requested by the editorial office of a mass media outlet is a form of satisfying citizens' rights to promptly receive information from the mass media on activities of public bodies and their representatives. Taking into consideration "that after a long period of time the requested information may lose its currency," the Resolution instructs the courts "to examine and adjudicate such cases as quickly as possible."

In the context of access to information the Resolution deals with the issue of accreditation of journalists. It discusses Article 48 of the Statute on the Mass Media, which is the only article in Russian law that concerns accreditation. The Resolution contains several conclusions:

1. Accreditation provides journalists with additional possibilities of seeking and obtaining information in comparison with those who are not accredited.
2. Rules concerning accreditation by state bodies, bodies of local self-government, state and municipal organizations may not impose limitations on the rights and freedoms of accredited journalists other than those foreseen in the federal statutes (for example, the suspension of an accreditation would not be a permissible measure as it is not stipulated by a federal statute).
3. There are no grounds to refuse accreditation or to cancel it other than those listed in Article 48 (these are: violation of the rules of accreditation and/or a court decision holding that the accredited journalist defamed the accrediting organization).

Thus the Supreme Court in fact says that a public body may not legally deny accreditation to a mass medium previously not accredited at that body, and it instructs the courts to assist journalists who sue against such a denial.

VII. Transparency of Court Proceedings

Somewhat separately, the Resolution discusses several norms that are not related to the Statute on the Mass Media, or at least not directly. The norms in question are from the Federal Statute “On the Provision of Access to Information on the Activity of Courts in the Russian Federation” that was only about to enter into force when the Resolution was adopted.¹⁹ In the Resolution the Supreme Court recalls that judges have no right to deny journalists access to court proceedings or to stop them from covering a particular case unless such a possibility is directly foreseen by law. Such a possibility is provided for by the procedural law related to closed sessions or in the situation where a person may be expelled from the courtroom for violation of the order of the court proceeding. Journalists may not be denied access, for example, because of a shortage of seats in the courtroom. The Resolution explains that any “closed door session” of the court of law on grounds that are not directly stipulated by the federal statutes contradicts the constitutional provisions that examination of cases in all courts shall be open. It also represents a possible violation of the right to a fair and public hearing as stipulated by point 1 of Article 6 of the European Convention on Human Rights and also point 1 of Article 14 of the International Covenant on Civil and Political Rights.

The Supreme Court explains under what conditions a request for information on activities of the courts may be denied. Among the circumstances foreseen by the Federal Statute “On Provision of Access to Information on the Activity of Courts in the Russian Federation” features “obstruction to justice,” which is described in the following way:

The information that may be refused according to paragraph 5 part 1 of Article 20 of the mentioned Federal Statute (the requested information presents an obstruction to justice) includes such information whose dissemination can create obstacles for execution of a fair trial guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (for example, it may jeopardise the equality of the parties, the adversarial nature of the proceedings, the presumption of innocence and reasonable terms for a case examination).

¹⁹ The Federal Statute “On the Provision of Access to Information on the Activity of Courts in the Russian Federation” N 3262-FZ of 22 December 2008 entered into force on 1 July 2010. See Andrei Richter, “Russian Federation: Transparency of Courts to Be Strengthened,” in *IRIS 2009-3: Extra*, <http://merlin.obs.coe.int/iris/2009/3/article101.en.html>.

The Resolution further explains the procedures for the use of recording equipment in the courtroom. It reminds that according to procedural law anyone (including journalists) when present at a court hearing may record the court proceedings in writing or by using audio recording equipment. The law does not oblige the person that makes the audio recording to notify the court of his doing so. At the same time the recording of a hearing by film, photo or video, or via television or radio broadcasting is allowed only with the court's (judge's) permission and the reporter is obliged to make his intention known to the court (judge). The Supreme Court provides an important reference point for judges when deciding whether or not to allow such audiovisual recording or broadcast: they shall balance the right of everyone to freedom of information, on the one hand, with the right of everyone to protect one's private life, personal and family secrets, honor and good name, secrecy of correspondence, telephone, mail, telegraph and other communications, and one's image, on the other. Thus for the first time the courts are recommended to consider in such situations the necessity to observe the right to information.

On 13 December 2012 the Supreme Court of the Russian Federation made a further step to promote transparency of court proceedings by adopting a Resolution "On Openness and Transparency of the Judicial Process and on Access to Information on Activity of the Courts."²⁰

In particular, the Resolution of the Supreme Court noted that given that the presence of journalists in an open court in order to obtain information on a case is a legitimate method to access information, and that in the exercise of professional activity journalists perform a public duty, it is not allowed to raise obstacles and refuse them in access to the courtroom on the grounds of their professional affiliation, because of the lack of accreditation, and (or) on other grounds that are not provided for by statutory law.

It referred to an important procedural privilege of the journalists as watchdogs of the public by saying that before the announcement of the ruling of the court to conduct the proceedings in a closed session court bailiffs may not expel from the courtroom journalists and prevent them in note-taking or audio recording of the court proceedings. The Supreme Court went further by instructing the judges that although after making such an announcement persons present who are not parties to the process are expelled from the courtroom, journalists should be allowed to leave the courtroom last.

The Supreme Court also spoke for a restricted meaning of privacy rights in a court hearing:

²⁰ Resolution of the Plenum of the Supreme Court of the Russian Federation "On Openness and Transparency of the Judicial Process and on Access to Information on Activity of the Courts" N 35 of 13 December 2012. The author took part in drafting the text of the Resolution. See its text (in Russian): http://www.vsrfr.ru/Show_pdf.php?Id=8331.

The presence in the case of the information that relates to the private life of individuals involved, is not an unconditional basis for the court's decision to hold proceedings in camera. Courts, in deciding whether to conduct proceedings in camera on grounds of ensuring the right of individuals to privacy or not, should take into account the nature and content of information about the private life of a person, as well as the possible consequences of the disclosure of such information.

The Resolution of the Supreme Court drew a presumption of the right of everyone present in an open court proceeding (including journalists) to record it in writing, by means of audio-, photo-, video-, and film recording, as well as to transmit (broadcast) it live. It furthermore instructed the courts to provide equal conditions for everyone to use this right.

While the procedural law stipulates that no permission of the judge is necessary to conduct text recording (note-taking) of the court proceedings, the Supreme Court interpreted such recording for the world of modern technologies so that it includes online reporting or texting (e.g. with the use of Tweeter, or online text reporting on a news website). In fact such online reporting of trials that present public interest has since become a new feature for online media in Russia that combine it with video and photo images. Most notably it is present at the website of RAPSI, or Russian Agency for Legal and Court Information²¹, but also Lenta.ru news portal, and Kommersant.ru, the website of a daily business newspaper.

VIII. Protection of Journalists' Privileges

Like elsewhere in the world Russian journalists, editors and media outlets enjoy certain privileges that under particular circumstances protect them from the need to check the truthfulness of the information that they disseminate and from related accusations of violating the law. They are all listed in Article 57 of the Statute on the Mass Media, and each of them is discussed in the Resolution.

According to Articles 57 and 35 of the Statute on the Mass Media, the editorial office, editor-in-chief and journalists of a mass medium are exempt from liability for disseminating information that is part of so-called "obligatory

²¹ The Russian Legal Information Agency (RAPSI) functions as a mass media outlet founded by the Russian Constitutional Court, Russian Supreme Court, Russian Supreme Arbitration Court, and RIA Novosti, <http://www.rapsinews.com/docs/about/index.html>. Russian Supreme Arbitration Court and RIA Novosti news service are currently being liquidated, therefore the fate of RAPSI remains unclear at the time of writing this chapter.

reports,” that is statements that an editorial office is obliged to publish by law or pursuant to a court order. The Resolution adds to the very few narrowly defined cases when the law speaks of an obligation to disseminate specific information (e.g., under martial law) the case of broadcasting or publishing (free of charge) material for election or referendum campaigning according to the rules of the relevant legislation. Such an obligation exists, for example, for state but also private broadcasters that agree to provide airtime for campaigning and therefore must comply with the conditions set in the Federal Statute “On Basic Guaranties of the Electoral Rights and the Right to Participate in a Referendum of Citizens of the Russian Federation.”²² The Resolution also includes in the list of exemptions the obligations imposed on the national state-run broadcaster by the Federal Statute “On Guarantees of Equality of Parliamentary Parties as to the Coverage of their Activities by the State-Run General TV and Radio Channels.”²³ By doing so the Supreme Court makes a bold step toward protecting the media from liability for the contents of the campaigning messages that they disseminate. Such dissemination typically occurs without real possibility for the editors to amend the content as any attempt of interference could be considered a violation of the electoral rights of candidates. From now on all liability for preelection statements lies with the politicians who make these statements.

The editorial office, the editor-in-chief and journalists are also exempt from liability in case the information that they disseminate is obtained from a news agency. In addition, the Statute on the Mass Media stipulates that when a media outlet is disseminating information received from a news agency it is mandatory to make a reference to the news agency which made the information available. The Supreme Court does not make the exemption from liability dependent on compliance with the reference requirement because it stipulates that in any case the outlet should prove that the disseminated information comes from a news agency.

The Supreme Court gives a crucial explanation with regard to the exemption from liability for information contained in interviews with representatives of state and local self-government bodies, state and municipal organizations, institutions, enterprises, bodies of public associations, and the official representatives of their press services. The Resolution instructs judges that the contents of such interviews shall have a legal nature equal to that of an official response of such organizations to an information request by the

²² See, e.g., Dmitry Golovanov, “Russian Federation: Electoral Campaigning Rules Modified,” *IRIS* 2007-1: 16/30, <http://merlin.obs.coe.int/iris/2007/1/article30.en.html>; and Natalie Boudarina, “Russian Federation: Changes in Election Law Concern Broadcast Media,” *IRIS* 2002-8: 10/20, <http://merlin.obs.coe.int/iris/2002/8/article20.en.html>.

²³ See Andrei Richter, “Russian Federation: Equal Rights Law Passed,” *IRIS* 2009-7: 19/32, <http://merlin.obs.coe.int/iris/2009/7/article32.en.html>.

mass media outlet (and in the case of disseminating the latter the media are also exempt from liability). Thus the media are now free from having to verify information provided by a variety of interviewed persons—from politicians and officials to press spokesmen. Earlier the practice of holding journalists liable for the content of interviews was quite common.

Further on the Resolution discusses a privilege related to official speeches and statements made by public officials as well as by delegates to the meetings of public associations such as political parties. There was a certain legal ambiguity as to which speeches can be considered “official.” The Supreme Court held that they include, for example, speeches by an official at a scheduled meeting, held in the presence of journalists, in specially allocated premises of a building of the corresponding body, organization or public association and in accordance with the approved agenda.

Because the media are exempt from liability only if they reproduce the words of the officials “literally,” the Supreme Court explains that the Statute on the Mass Media does not necessarily require verbatim reproduction as the courts believed was the case. The Resolution states that literal reproduction is “a form of quotation that does not change the meaning of the statements, reports, materials and their fragments and where the author’s words are quoted without distortion.” At the same time, the Supreme Court notes that it is important to consider that every so often exact fragments of statements, reports or materials, when quoted out of context, can appear to have a different meaning to the original meaning of the statement, report or material. Thus the Resolution’s interpretation of literal reproduction becomes very favorable for responsible media outlets.

Article 57 of the Statute on the Mass Media also makes media outlets immune from liability for literal reproduction of materials taken from other mass media “which can be ascertained and called to account for a breach of the legislation of the Russian Federation on mass media.” When considering the norm, the Supreme Court recalls that the “other mass media” do not need to be necessarily outlets registered in Russia. According to the provisions contained in paragraphs 2 and 3 of Article 402 of the Civil Procedural Code of the Russian Federation, a foreign outlet can be held liable in Russia, if the defendant organization, its administrative body, branch or representative office are on the Russian territory or if the defendant citizen resides in Russia or if the defendant has property on Russian territory, or (even more importantly)—in defamation cases—if the plaintiff resides in Russia.

IX. Public Interest

The Supreme Court notes that there are three norms in the federal law related to mass media activities that refer to “the public interest”:

1. Art. 49, para. 1, subpara. 5, of the Statute on the Mass Media stipulates a ban on the dissemination of information concerning the private life of citizens in the mass media without their prior consent or the prior consent of their legal representatives unless disseminating the information is necessary for the protection of public interests.
2. Art. 50, para. 1, subpara. 2, of the same statute allows for dissemination of reports and materials produced with the assistance of hidden audio and video recording, film recording and photography if this is necessary for the protection of public interests and provided that measures against possible identification of outsiders have been taken.
3. Art. 152 of the Civil Code of the Russian Federation specifies that the divulging and further use of the image of a citizen is allowed only with the consent of the citizen. His consent is not needed, however, if the use of the image is in state, social or other public interests.

Because the notion of public interest is not legally defined, courts are in a difficult position when adjudicating on conflicts based on different interpretations of public interest. Providing such a definition turned out to be a difficult task, especially because the laws of other European countries rarely provide examples.²⁴ Therefore the Supreme Court relies for its definition on the case law of the European Court of Human Rights.

The Resolution notes that “public interest shall be understood not as any interest expressed by the audience but as, for example, the need of the public to reveal and expose a threat to the democratic state governed by the rule of law and to civil society, to public safety, and to the environment.” The Resolution does not limit the notion to clear-cut examples but goes further by instructing the courts to

make a distinction between reporting facts (even controversial ones) capable of contributing in a positive way to a debate in society, concerning, for example, officials and public figures in the exercise of their functions, and reporting details of the private life of an individual who does not exercise any public functions. While in the former case the mass media exercises its public duty by contributing to imparting information on matters of public interest, it does not do so in the latter case.

With this reasoning the Russian Supreme Court clearly follows the arguments of the European Court of Human Rights in its famous judgments con-

²⁴ See, e.g., the Statute of the Republic of Moldova on Freedom of Expression described in Andrei Richter, “Moldova: Freedom of Expression Act Enters into Force,” *IRIS* 2010-9: 1/32, <http://merlin.obs.coe.int/iris/2010/9/article32.en.html>.

cerning the cases of *Observer and Guardian v. The United Kingdom* and *Von Hannover v. Germany*.²⁵ If the media disclose aspects of private life with the aim to uncover corruption or other offences of politicians and officials such an endeavor establishes circumstances that grant the editorial office immunity from lawsuits aimed at protection of private and family life. This needs to be distinguished from cases when the disclosure of private information is done for the sake of sensation or seeks to cater to lowbrow interests of the audience. In these cases the law shall not grant protection.

This position of the Supreme Court is extremely important for the sake of political discussion in the Russian media because it allows journalists to widely use the rights provided to them by the Statute on the Mass Media and the Civil Code of the Russian Federation.

X. Protection of Confidential Sources

The Supreme Court discusses another important issue for political journalism: the conditions for disclosure of confidential sources of information. The Resolution reminds the courts that they shall be guided by Article 41 of the Statute on the Mass Media, which stipulates that the editorial office is obliged to keep the source of information secret and has no right to name the person who has provided the information with the proviso that his name not be divulged. The Resolution states that the personal data of the person making the proviso is "secret information, which is specially protected by the federal statute." An exception applies, if the demand for disclosure is made by a court of law in connection with a case pending before that court.

By providing this explanation the Supreme Court confirms that there is no contradiction between Article 41 of the Statute on the Mass Media quoted above and Article 56 of the Criminal Procedure Code of the Russian Federation adopted after the Statute on the Mass Media. Article 56 provides a list of persons who may not be called to testify in court as witnesses (attorneys, clergymen, etc.). The list does not mention journalists or editorial workers, which does not exclude in principle that there may be other groups enjoying relief from the duty to witness in court. This is confirmed by the Constitution (Art. 51, para. 2) which declares: "A federal statute may envisage other cases of absolution from the obligation to testify." The importance of the explanation of the Supreme Court lies in reminding prosecutors and investigation bodies that are more accustomed to work with the Criminal Procedure Code than the Statute on the Mass Media which norm to apply—and that is the norm of the Statute on the Mass Media on confidentiality of sources.

²⁵ Cases of *Observer and Guardian v. the United Kingdom* (Application no. 13585/88); *Von Hannover v. Germany* (Application no. 59320/00).

And even though a court of law may still demand such a disclosure at any stage of the case deliberations, the Supreme Court makes an important clarification for the freedom of the media in this regard. The Resolution stipulates that such a demand is allowed only after “all other means to learn about relevant circumstances, which are important for the just examination and adjudication of the case, are exhausted and the public interest in disclosure of the source of information overrides the public interest in keeping it a secret.” Here again the Supreme Court follows the case law of the European Court of Human Rights.²⁶ It is clear that the Resolution obliges the courts from now on to provide reasons for why the public interest in disclosure would outweigh the necessity to keep the source secret.

XI. Abuse of the Freedom of Mass Media

An abuse of the freedom of mass information (Art. 4) leads to written warnings issued by authorized bodies and public officials to the editorial office of a mass media outlet (editor-in-chief) or its founder (for example, according to Article 16 of the Statute on the Mass Media, Articles 8 and 11 of the Federal Statute “On Counteracting Extremist Activity”).²⁷ It is to be remembered that under the Federal Statute “On Counteracting Extremist Activity” the activities of a mass media organization may be terminated if the warning is not appealed, or deemed illegal by the court, and if the infringements are repeated within twelve months from the date when the warning was issued or if new facts are discovered that prove the carrying out of an extremist activity by the mass media organization. The Statute on the Mass Media tolerates two repetitions of the infringements (followed by warnings) before a court order for the termination of the activity of the mass media outlet is issued and not just one as is the case under the anti-extremism act. The court shall thus impose a ban on the production and dissemination of the mass media to stop an abuse of the freedom of mass information (according to Art. 16 and 16-1 of the Statute on the Mass Media, Art. 11 of the Federal Statute “On Counteracting Extremist Activity”).

²⁶ E.g., judgment on the case of *Goodwin v. The United Kingdom* (Application no. 17488/90).

²⁷ See Natalie Boudarina, “Russian Federation: How to Prevent Extremism in Mass Media,” *IRIS* 2002-8: 15/32, <http://merlin.obs.coe.int/iris/2002/8/article32.en.html>; Dmitry Golovanov, “Russian Federation: Electoral Campaigning Rules Modified,” *IRIS* 2007-1: 16/30, <http://merlin.obs.coe.int/iris/2007/1/article30.en.html>; Nadezhda Deeva, “Russian Federation: Anti-Extremism Amendments,” *IRIS* 2007-9: 19/27, <http://merlin.obs.coe.int/iris/2007/9/article27.en.html>; and Andrei Richter, “Russian Federation: Warning to Broadcaster Annulled,” *IRIS* 2009-8: 18/28, <http://merlin.obs.coe.int/iris/2009/8/article28.en.html>.

A case concerning the closure of a media outlet should be dealt with only by the top court of the particular subject (region) of the Russian Federation where the dominant part of the dissemination of the media outlet takes place (that is, the second instance court). This explanation reportedly helped a media outlet, which had been shut down for extremism on the very day of the Resolution's adoption, to successfully appeal this decision of a Moscow district court.

The Supreme Court explains that the warnings issued by the authorized bodies²⁸ or their officials represent an authoritative declaration that leads to legal consequences for the founder/cofounders of the mass media outlet and/or its editorial office (editor-in-chief). Earlier in a substantial number of cases²⁹ the authorized body would attempt to prevent court deliberations on the legality of warnings by claiming that they just forewarned a person to refrain in the future from illegal activity, and to prevent offences. Thus, so was the argument, their letters of warning had no direct or negative influence on the activity of the person. Therefore they could not be disputed in court. Disagreeing with this reasoning, the Supreme Court stresses that disputes about warnings are susceptible to judicial examination in accordance with the procedure stipulated in Chapters 23 and 25 of the Civil Procedural Code of the Russian Federation.

These two chapters are part of Subsection III of the Code ("Proceedings on Cases Arising from Public Legal Relations"): Chapter 23 describes the general provisions, whereas Chapter 25 determines the procedure for disputing decisions and actions (inaction) of state bodies, officials and governmental employees.

Russian judges have also received a number of additional reference points on how to deal with disputes concerning the legality of warnings. When determining whether indeed an abuse of the freedom of mass information took place (and the warning is therefore legal) the courts shall now take into account not only the words and phrases (wording) in the article, television or radio program but also the context in which they were delivered (such as aim, genre and style of a publication, a program or a part of it, whether they can be considered as an expression of opinion in the sphere of political discussions or as an attempt to draw attention to the discussion of socially important matters, and what is the attitude of the interviewer and/or the representatives of the editorial office of the mass media outlet toward the expressed opinions, judgments or statements), as well as take into account the social and political situation in the country at large or in one of its parts (depending on the area of dissemination of the particular mass medium).

²⁸ That is Roskomnadzor and any office of the public prosecutor.

²⁹ Like in the case of the *South Park* cartoon series, see Andrei Richter, "Russian Federation: Warning to Broadcaster Annulled," *op.cit.*

Again the Supreme Court follows the position of the European Court of Human Rights expressed in its judgments in *Jersild v. Denmark*,³⁰ *Leroy v. France*³¹ and other cases. It seems that not only the courts but also the authorized bodies (Roskomnadzor and the public prosecutor's office) and their officials will have to take the above quoted points into consideration when substantiating to the editorial offices their demands relating to an abuse of the freedom of mass information.

Without making it explicit, the Resolution seems to suggest that the courts when adjudicating on a possible abuse of mass information clarify whether or not the editor-in-chief aimed at such an abuse. It is the editor-in-chief who according to the Statute on the Mass Media takes the final decisions on the production and issue of a mass medium and it is he who bears responsibility for respecting the conditions that the Statute on the Mass Media and other legislative acts of the Russian Federation (Art. 2 para. 10, part 1, and Art. 19, part 5,) impose on the activity of a mass medium.

When adjudicating on the attitude of the interviewer and/or editors to statements made by the participants of live broadcasts, the courts shall "take into account the peculiarities of television and radio broadcasting which limit the possibilities of journalists and editors to correct, clarify, interpret or comment." It appears that the explanation does not refer only to the so-called live "author's programs" where broadcasters benefit from an exemption from liability concerning the content (Art. 57, para. 1, point 5, of the Statute on the Mass Media).

In this context, the Resolution directly quotes point 5 of the Declaration on Freedom of Political Debate in the Media of the Council of Europe's Committee of Ministers (2004): "The humorous and satirical genre, as protected by Article 10 of the [European] Convention [on Human Rights], allows for a wider degree of exaggeration and even provocation, as long as the public is not misled about facts."³² This reference, which can also be found in earlier resolutions of the Supreme Court,³³ helps to establish a more enabling environment for the dissemination of political cartoons, satirical shows, etc., in the media. Exaggeration and provocation in these genres are now considered

³⁰ Case of *Jersild v. Denmark* (Application no. 15890/89).

³¹ Arrêt de la Cour européenne des Droits de l'Homme (cinquième section), affaire *Leroy c. France*, requête n° 36109/03 du 2 octobre 2008.

³² See Council of Europe, Committee of Ministers, "Declaration on Freedom of Political Debate in the Media," 12 February 2004, <https://wcd.coe.int/ViewDoc.jsp?id=118995&Lang=en>.

³³ For example, in the Resolution "On Judicial Practice Related to Disputes on the Protection of Honour and Dignity of Citizens, as Well as of the Business Reputation of Citizens and Legal Entities" N 3 of 24 February 2005, see Andrei Richter, "Russian Federation: Supreme Court on Defamation," *IRIS 2005-4*: 18/32, <http://merlin.obs.coe.int/iris/2005/4/article32.en.html>.

permissible in the media and shall not serve as grounds for liability in defamation lawsuits.

Further on the Supreme Court notes that Article 4, para. 1, of the Statute on the Mass Media considers it to be an abuse of the freedom of mass information if mass media are used for committing penal offences. At the same time, courts have exclusive jurisdiction to rule on criminal cases (part 1 of Art. 8 of the Criminal Procedural Code of the Russian Federation). Therefore neither Roskomnadzor, nor the prosecutor are entitled to decide whether the mass media has indeed been used for committing a penal offence. Thus the legality of a warning on this type of abuse shall be determined with consideration of whether an enforceable conviction or any other judicial decision on the criminal case exists.

Since adoption of the Resolution the State Duma three times adopted statutes that expanded Article 4 of the Statute on the Mass Media. In particular, it added a ban to use curse words in the media. Its violation led in 2013 to the closure by courts of a popular media outlet, Rosbalt news agency.

The Supreme Court struck back on 19 March 2014, when it's Judicial Chamber on administrative cases made a resolution on an appeal complaint from Rosbalt.³⁴ The Supreme Court found that the lower courts had refused to look into the essence of Roskomnadzor claims while the warnings of the watchdog had been procedurally faulty. It looked into the two warnings sent on 12 and 25 July 2013 to the Rosbalt's editorial office by Roskomnadzor, which claimed an abuse of media freedom by means of posting materials that contained obscene language. It also reviewed subsequent decision of the Moscow City Court to permanently annul Rosbalt's certificate of registration (dated 31 October 2013).

In this resolution the Supreme Court noted the legal standing of the Constitutional Court of the Russian Federation by saying that "limitations by law of freedom of speech and the right to disseminate information may not take place in relation to activities or information on the mere grounds of their inconformity with established traditional views, or contradiction with moral and/or religious preferences. Other will mean a retreat from the constitutional demand of necessity, proportionality and fairness of limitations of human rights..."

The Supreme Court found that the sanctions imposed on Rosbalt were disproportionate and disregarded the context of the news stories. The stories, one of them on Pussy Riot band, did not aim to shock imagination of the Internet users, but were rather of socio-political nature. Therefore the Moscow City Court decision could not be recognized as lawful. The Supreme

³⁴ Resolution of the Judicial Chamber on administrative cases of the Supreme Court of the Russian Federation on case N 5-APG13-57, available (in Russian) at http://www.supcourt.ru/stor_pdf.php?id=584842 (published on 26 March 2014)

Court pronounced it null and void, and took a new decision that refuted Roskomnadzor claims.

XII. Suspension of Activity, Suspension of Coverage

The Resolution recalls that according to the Statute on the Mass Media the legal nature of the suspension of media activity is to temporarily prohibit the production and/or distribution of the output of the mass media outlet.

The Supreme Court stipulates that suspending the activity of a media outlet represents an exceptional interim measure in support of a claim. Courts shall only use it to the extent that they may rule on a request for a preliminary decision in cases concerning the termination of the mass media activity directly foreseen by the Statute on the Mass Media or the Federal Statute “On Counteracting Extremist Activity.” This leads the Supreme Court to two important conclusions. The Resolution points out that in other civil cases concerning the activity of the mass media, media activity may not be suspended on application for interim measures. Along with this guidance, the Supreme Court denies (but only in civil cases) courts the right to ban editorial offices from preparing and disseminating new materials on certain events or persons. A different court decision would not meet the aims set in Article 139 (“Grounds for Interim Measures”) of the Civil Procedural Code and “will not be necessary to secure the authority and impartiality of justice.” Such a ban would also compromise justice because the court (judge) may not prevent mass media representatives “from covering a particular court case, with the exceptions foreseen by statute.” The Supreme Court aims at cases where plaintiff files a request for a preliminary injunction with the court to stop the media outlet from publishing any new materials that concern him.

The explanations of the Supreme Court on this matter expand the freedom of expression beyond the limits set in Article 10 of the European Convention on Human Rights by brushing away any possibility to limit such freedom by banning the coverage of certain subjects. The explanations are related to the 2009 judgment of the European Court of Human Rights in the case of *Obukhova v. Russia*,³⁵ but at the same time go far beyond what was said in the judgment.

In this judgment, the Strasbourg-based European Court of Human Rights referred to a request of a plaintiff (a judge) to a Russian court to order interim measures, and notably an interlocutory injunction against a newspaper to prevent publication of “any articles, letters or materials about the factual circumstances of the traffic accident of 22 September 2001, as well as about the court proceedings concerning that accident until they [had] fin-

³⁵ Case of *Obukhova v. Russia* (Application no. 34736/03).

ished." While the European Court of Human Rights ruled that such a measure was not "necessary in a democratic society" (27), it did not contest that the interference was "prescribed by law," namely the provisions of the Code of Civil Procedure of the Russian Federation governing application of interim measures. Moreover, as regards the legitimate aim of the interference, the Court was prepared to accept that the injunction envisaged "maintaining the authority of the judiciary" as one of its legitimate aims. The Court did so because this phrase includes the protection of the rights of litigants and because the purpose of the injunction was to enable the defamation action to be heard without the plaintiff's rights in the meantime being prejudiced (21).

The Supreme Court made another major remark concerning the discussion on interim measures in civil cases where a mass media outlet is the defendant. In order to comply with the requirements of Article 140, para. 3, of the Code of Civil Procedure of the Russian Federation ("measures granted in response to a claim shall be proportional to the plaintiff's claim") the courts shall consider the nature of the offences that took place (particularly, whether they can be regarded as cases of abuse of the freedom of mass information or if they represent other violations of the mass media law), but also assess the negative consequences for the freedom of mass information which can be caused by imposing such measures.

In 2011 the State Duma adopted two statutes that have dramatically expanded the grounds for a suspension of activities of mass media outlets. First, within the major reform of the provisions of the Statute on the Mass Media that regulate broadcasting and Internet, the parliament introduced a broad possibility for Roskomnadzor to suspend a broadcasting license. A three-month suspension of operation was now made possible for a broadcaster's failure to follow Roskomnadzor's prescript on a violation of its licensing requirements (Art. 31-7). Second, a suspension of dissemination of the mass media output was introduced in the case of violation of the 2010 statute "On protection of children from information detrimental to their health and development" ³⁶ (Article 25).

XIII. Conclusion

The Resolution was unique and a long-awaited and important event in the legal regulation of Russian mass media. By analyzing its text one remarks the extraordinary character of its essential content.

The Resolution's approach to various norms is also important for the neighboring countries where the same or similar norms exist in the media law

³⁶ Federal statute "On protection of children from information detrimental to their health and development" N 436-FZ of 29 December 2010.

because their top courts are attentive to such acts of the Supreme Court of the Russian Federation. The Resolution was welcomed by international institutions such as the OSCE Representative on Freedom of the Media³⁷ and was positively reviewed in the Western press.³⁸

In our view the significance of the Resolution is not only to set uniform rules for court practice. Adopted at a critical stage in national journalism, it pushed the editorial offices to provide an honest service aimed at truthfully and critically informing the public on issues of common interest, and most of all, on political developments in Russia. At the same time, journalism as mass entertainment for the sake of ratings and maximum profits is to get less protection in courts.

The Resolution allows Russian media to engage in socially responsible journalism without being threatened by illegal pressure in the courtroom, extreme demands by state bodies and excessive bureaucratic procedures. By adopting it the Supreme Court in fact instructs the judges to stand guard of a professionally honest quality journalism in Russia.

Unfortunately more recent amendments to the Statute on the Mass Media and other pieces of legislation attempt to reverse this positive trend set by the Supreme Court. The authorities apparently were not happy with such a liberal approach and one after another indented into the ideas set by the top court and graded the meaning of the Resolution. The laws were modified so as to leave the judges with little or no room for maneuver. The executive adopted instructions that were against the spirit of the Resolution. By Constitution the Supreme Court cannot change or challenge the legislation, therefore in this seeming or real tug-of-war the Supreme Court cannot win. What it can do and what it does is to continue to interpret the legislation in the best possible way for democracy and freedom of the media in Russia. This pattern gives a hope that the existing fragile balance between the interests of free expression and other interests, that are so strongly pushed for by the Government, will not be tipped.

³⁷ See "OSCE media freedom representative, on a visit to Moscow, welcomes Russian Supreme Court's resolution on media law", <http://www.osce.org/fom/69438>, and "OSCE Media freedom representative welcomes Russian Supreme Court's resolution on civil libel lawsuits", <http://www.osce.org/fom/72301>.

³⁸ See, e.g., Andrei Richter, "Russian Media Granted Greater Freedom", *The Guardian*, 22 June 2010, <http://www.guardian.co.uk/commentisfree/2010/jun/21/russia-court-mass-media-freedoms-journalism#start-of-comments>.

Access to Information in Kenya: The Law and Practice Since 1991

EZRA CHILOBA

I. Introduction

This chapter assesses the development of access to information policy and practice in Kenya since the reintroduction of multiparty politics in 1991. It highlights the benefits of increased access to information in general, provides a broad overview of the economic and political context of Kenya, and reviews the law, relevant judicial decisions and administrative procedures in relation to access to information. Finally, this chapter draws some general conclusions while providing a perspective on the future of access to information in Kenya. The general principles of access to information endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in 2000 provide the conceptual framework for this chapter.

II. Why Access to Information?

The trend in the adoption of access to information laws around the world has been on the increase in the last two decades. This is partly due to the expansion of access to information advocacy coalitions,¹ as well as the emerging evidence of potential benefits of openness and transparency in governance. In essence, information is a source of empowerment for effective *public*

¹ Open Society Justice Initiative, *Transparency and Silence: A Survey of Access to Information Laws and Practices in Fourteen Countries* (New York: Open Society Institute, 2006), 21, https://www.ip-rs.si/fileadmin/user_upload/Pdf/Publikacije_ostalih_poo-blascencev/Transparency_and_Silence__Justice_Initiative.pdf.

participation in governance.² In this respect, citizens are entitled to know about government actions in order to make informed choices.³ This in turn builds *public trust* in public institutions.⁴ Increased access to information is also instrumental in *corruption control* through enhanced accountability and transparency in the management of public affairs.⁵ In a country where information is confined to a few political elites—where there is an imperfect flow of information—it is difficult for the public to hold the government to account.⁶

In relation to economic growth and motivation to invest, government openness contributes to increased stability in economic and financial markets.⁷ Notably, countries with less transparency tend to experience lesser levels of investments because of information distortion and unsystematic disclosures.⁸ This is a major issue of concern for developing countries because in the long run, it affects their growth and overall human development. As observed by the UN Special Rapporteur on Freedom of Opinion and Expression, the

² Ali A. Pourezzat et al., "E-Government and Empowerment: Impact of Equal Access to Information and Developing Public Language" (2008), <http://lexetscientia.univn.fr/ufiles/14.%20Iran.pdf>.

³ Joseph E. Stiglitz, "On Liberty, the Right to Know and Public Disclosure: The Role of Transparency in Public Life," in Matthew J. Gibney, ed., *Globalizing Rights: The Oxford Amnesty Lectures 1999* (Oxford: Oxford University Press, 2003), 115–56.

⁴ Ana Bellver and David Kaufmann, "Transplanting Transparency: Initial Empirics and Policy Applications," World Bank Policy Research Working Paper (2005); Cornelia Moser, "How Open Is 'Open as Possible'? Three Different Approaches to Transparency and Openness in Regulating Access to EU Documents," IHS Political Science Series, No. 80 (2001), <http://aei.pitt.edu/237/>.

⁵ Bellver and Kaufmann, "Transplanting Transparency"; Roumeen Islam, "Into the Looking Glass: What the Media Tell and Why—An Overview," in *The Right to Tell: The Role of Mass Media in Economic Development* (Washington, DC: World Bank, 2002); Paolo Mauro, "The Persistence of Corruption and Slow Economic Growth," IMF Working Paper, WP/02/213 (2004); Ritva Reinikka and Jakob Svensson, "The Power of Information: Evidence from a Newspaper Campaign to Reduce Capture," World Bank Policy Research Working Paper (2003), <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-3239>.

⁶ Derrick W. Brinkerhoff and Sarah C. Keener, "District-Level Service Delivery in Rural Madagascar: Accountability in Health and Education," Report Prepared for the World Bank (Research Triangle Institute, 2003), www1.worldbank.org/publicsector/decentralization/Feb2004Course/Background%20materials/Brinkerhoff.doc.

⁷ Zubaidur M. Rahman, "The Role of Accounting Disclosure in the East Asian Financial Crisis: Lessons Learned?," *Transnational Corporations* 7.3 (1998): 1–52. Gil Mehrez and Daniel Kaufmann, "Transparency, Liberalization and Banking Crises" (2000), <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2286>.

⁸ Gaston R. Gelos and Shang-Jin Wei, "Transparency and International Investor Behavior," W9260 NBER Working Paper (October 2002).

right to information is critical, not only to democracy but also to the realization of the right to development.⁹

III. The Political Context of Access to Information in Kenya

Kenya attained her independence from the British in 1963. For three decades shortly after independence, the country was mostly governed under a single-party regime by the Kenya National African Union (KANU). However in 1991, the constitution was amended to allow for multiparty democracy. Yet even after the reintroduction of multiparty politics, KANU went on to win elections in 1992 and 1997, extending its authoritarian rule until 2002, when it was dislodged from power by a united opposition under the umbrella of the National Alliance of Rainbow Coalition (NARC).

Under the KANU regime, Kenya had mixed fortunes. On the one hand, the country was relatively peaceful compared to most of her neighbors, who were either in civil war or experiencing political instability.¹⁰ But on the other hand, civil liberties and the economy were increasingly on a downward trend.¹¹ KANU nurtured a closed society where corruption, violations of human rights and official impunity thrived.¹²

After the 2002 general elections, NARC, under the leadership of President Mwai Kibaki, promised a plethora of reforms to revive the country's economy, eradicate poverty and secure civil liberties. During the NARC regime (2002–2007), Kenya experienced more political freedoms, improved economic growth, anticorruption reforms and the decentralization of public funds to the local levels.¹³ However, in the run-up to the 2007 elections, the Kibaki administration was accused by the opposition, among other issues, of failure to complete the required constitutional reforms, condoning high-

⁹ Report of the Special Rapporteur, Promotion and Protection of the Right to Freedom of Opinion and Expression, 18 January, 2000, U.N. Doc. E/CN.4/2000/63, para. 42.

¹⁰ Sudan, Uganda, Somalia and Ethiopia are countries that have experienced constant conflict and been under extreme authoritarian regimes. However, Kenya had its share of political instability in December 2007 after a controversial presidential election—but somehow international intervention in the political crisis led to the formation of Grand Coalition government in April 2008 for the sake of peace.

¹¹ Detentions without trial were meted against those who championed multiparty democratic activities in the 1980s and 1990s. Calls for the assassination of prominent leaders also occurred during the same period.

¹² See Godwin Murunga, "The State, Its Reform and the Question of Legitimacy in Kenya," *Identity, Culture and Politics* 5.1–2 (2004): 179–206.

¹³ Some of the institutions include the Kenya Anti-Corruption Commission, the Kenya National Commission on Human Rights (www.knchr.org), Universal Free Primary Education (www.education.go.ke) and the establishment of a devolved funds/constituency development fund (www.cdf.go.ke), among others.

level corruption, and failing to address the inequitable distribution of national resources across the country's regional and ethnic groups.¹⁴ Irrespective of the alleged failings of the Kibaki administration in the first five years, Kenya registered significant development progress in comparison to the situation which existed under the KANU regime.

The year 2007/08 will remain as one of the most traumatic in Kenya's history. Following heated political campaigns between two major political parties—the Party of National Unity (PNU) and the Orange Democratic Movement (ODM)—unprecedented violence erupted over disputed presidential results. Over a thousand people were killed by both civilian mercenaries and state police force. It was only after the intervention of the international community that the parties agreed to form a grand coalition government, a move which led to the cessation of the ethnic-based violence.

As part of the peace agreement, the Grand Coalition government, with the support of the international community, prioritized the implementation of far-reaching reforms that included—but were not limited to—the enactment of a new constitution, increased transparency, the fight against corruption, and reforms in electoral management. These reforms formed part of what is referred to as Agenda 4 reforms. The aim was to undertake radical changes in the management of public affairs in Kenya in order to guarantee a peaceful and stable society. Following the Agenda 4 reforms, Kenyans overwhelmingly endorsed a new constitution on 4 August 2010 through a national referendum. Kenya's 2010 Constitution has been billed as one of the most progressive constitutions in modern history.

When studying access to information in Kenya, it is important to mention that the post-independence government inherited most of its institutions from the British colonial masters. Emerging from a colonial regime, the new leadership thought that the country still had fragile political structures which could not withstand scrutiny for its policy failures.¹⁵ The government of the day expected the media to “champion only the positive things about the state and ignore the less acceptable ones.”¹⁶ It was not long, however, before KANU embedded itself and entrenched a system of political patronage and secrecy. Since 2002, after NARC formed government, the political space for policy dialogue shifted in favor of public engagement.

¹⁴ During the NARC government (2002–2007) it emerged that some high-ranking officials in government had been involved in corrupt activities—the Anglo Leasing scandal. They were forced to resign but were later reappointed back into the government. This angered opponents of the Kibaki Administration.

¹⁵ Faith W. Gathu, “Freedom of Expression in Kenya and USA: A Comparison,” *Africa Media Review* 9.3 (1995): 76–89.

¹⁶ Peter Wanyande, “Mass Media-State Relations in Post-Colonial Kenya,” *Africa Media Review* 9.3 (1995): 56, 54–75.

IV. Access to Information in Kenya Prior to 2010

Before the enactment of Kenya's 2010 Constitution, there was no comprehensive policy platform upon which access to information was managed. In fact, inferences would only be made to different statutes and administrative procedures that were not in themselves coherent in relation to access to information.¹⁷ As observed by Snell, most governments are very parsimonious with information they consider politically sensitive.¹⁸ Hence, they will adopt internal mechanisms that impede free access to such information.¹⁹ This could be said of Kenya, which adopted procedures that defined the *scope* of information disclosure; *when* such information should be disclosed; and, in other cases, *penalties* for unauthorized disclosure. However, the latter part of this decade has shown a significant policy shift towards more transparency.

A. The Pre-2010 Constitution and Judicial Interpretation

Under the pre-2010 Constitution, the right to information was framed in the language of the Universal Declaration of Human Rights (UDHR) and the International Covenant for Civil and Political Rights (ICCPR). Clause 79 of that Constitution stated:

Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication is to the public generally or to any person or class of persons) and freedom from interference with his correspondence.²⁰

While the UDHR does not provide for any limitations, the ICCPR provides circumstances under which the right may be derogated from. These limitations were adopted in Clause 79 of the Constitution and included: interests of

¹⁷ See also Peter O. Mbeke, "Law Regulation and Politics in Kenya since 2002." In: *BBC World Service Trust Policy Brief No. 1*. BBC World Service Trust (2008). http://downloads.bbc.co.uk/worldservice/trust/pdf/kenya_media_legal_framework.pdf.

¹⁸ Rick Snell, "FOI and the Delivery of Diminishing Returns, or How Spin-Doctors and Journalists have Mistreated a Volatile Reform," *The Drawing Board: An Australian Review of Public Affairs* 2.3 (2000): 187-207.

¹⁹ See Alasdair S. Roberts, Spin Control and Freedom of Information: Lessons for the United Kingdom from Canada," *Public Administration* 83.1 (2005):1-23.

²⁰ Constitution of Kenya, Clause 71(1).

defense, public safety, public order, public morality or public health, protection of reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence and restrictions imposed upon public officers or upon persons in the service of a local government authority. As a general rule, *such restrictions must be reasonably justifiable in a democratic society.*

It is the judgment in the case of *Martha Karua v. Radio Africa Ltd. t/a Kiss FM*²¹ that some of the limitations in Clause 79(1) of the then Constitution were expounded upon by the High Court of Kenya. This was a defamation case in which the plaintiff, a government minister, had sought damages against a local FM radio station, Kiss 100. The defendant argued that freedom of expression was a special right and the limitations stipulated in the Constitution should be ignored. In a more elaborate manner, the two justices of the Court reviewed international human rights instruments and jurisprudence from other jurisdictions on the question of limitations on the right to freedom of expression. In their analysis, the judges affirmed that freedom of expression must be exercised in cognizance of the rights of others and the general social good in a democracy. They observed that:

The limitation on freedom of expression *is not* inconsistent with what is universally acceptable principle that freedom of expression is the basic element of public order of a democratic society and it presupposes both the widest circulation of news, ideas and opinion and the widest possible access to information by the society as a whole and the hallmark of the concept of public order in society is free debate in which dissenting opinions can fully be heard and views can fully be disseminated although they may shock, offend or disturb. After all as often repeated a society that is not well informed is not truly free.²²

The Court went on to highlight guiding principles in the interpretation of the limitation clauses on rights and freedoms. First, the Court underscored the principle of *reasonableness* by stating that legislative objective of the limitation law must be driven by substantial and not trivial concerns that must be in harmony with the values of a democratic society.²³ Second, the Court emphasized that there must be *proportionality*; meaning, the limitation must be rationally connected to its objective, impair on the right or freedom as lit-

²¹ *Martha Karua v. Radio Africa Ltd. t/a Kiss FM*, H.C. Civil Suit No. 288 of 2004, eKLR (2006). http://www.kenyalaw.org/CaseSearch/view_preview.php?link=76522216729445104531860&words=kinyanjui&mode=2.

²² *Ibid.*

²³ *Ibid.* The court was citing the Canadian case of *R. v. Oakes* (1986) DLR 4th 200.

tle as possible, and that there should be proportionality between its effects and its objective.²⁴ Finally, the Court endorsed the decisions by the European Commission in the case of *Hyde v. United Kingdom*²⁵ and the South African case of *S. Makwanyane and Another*²⁶ on the definition of what amounts to “justifiable in an open and democratic society.” In both cases, it was held that there is need for a delicate balance between the interests of an individual and that of the greater good of the majority of the society; interests which may involve weighing competing values based on proportionality.

But the Court also noted that while the Kenyan law and indeed some international instruments stipulate limitations on freedom of expression, the German case is different. The German basic law on fundamental rights and freedoms is absolute and in no circumstances can such rights and freedoms be encroached upon.²⁷ And so is the case with the African Charter on Human and Peoples Rights.²⁸ Interestingly, even as the Court interpreted the law as it is, it held the view that future constitutional reforms should consider being consistent with the African Charter.²⁹ As it will be shown later, the subsequent constitutional reforms did not follow the Court’s opinion of making the freedom of expression an absolute right.

In yet another case, the Kenyan High Court was invited to rule on an issue of contention between the public interest to access information and the competing individual right to privacy.³⁰ In the case of *Christopher Ndarathi Murungaru v. Kenya Anti-Corruption Commission & Another*, Murungaru, a former minister in the Kibaki administration sought to challenge the decision by the Kenya Anti-Corruption Commission (KACC) to have him furnish information on his assets and the mode of acquisition—in order words, to declare the sources of his wealth. Murungaru argued that such an order amounted to an intrusion into his right to privacy. In rejecting his argument, the High Court held that:

[T]he statutory requirement under section 26 in respect of a person reasonably suspected of corruption under section 27 (in respect of

²⁴ Ibid.

²⁵ 1 EHRR 737, 95.

²⁶ 1995 (6) BCLR, 665.

²⁷ See *Martha Karua v. Radio Africa Ltd. t/a Kiss FM*, H.C. Civil Suit No. 288 of 2004, KLR (2006). http://www.kenyalaw.org/CaseSearch/view_preview.php?link=76522216729445104531860&words=kinyanjui&mode=2.

²⁸ Ibid.

²⁹ Ibid.

³⁰ See *Christopher Ndarathi Murungaru v. Kenya Anti-Corruption Commission & Another*, H.C Misc Civ. Appl. 54 of 2006, eKLR (2006), [http://www.kenyalaw.org/CaseSearch/view_preview.php?link=40303039542217380316162&words=judicial commission of inquiry &mode=2](http://www.kenyalaw.org/CaseSearch/view_preview.php?link=40303039542217380316162&words=judicial%20commission%20of%20inquiry&mode=2).

associates), and section 28 (in respect of records, books and documents) are a necessary and constitutionally justifiable intrusion of the privacy of a home and the interest of the rights and freedom of others and the public interest. It is not justifiable in a democratic society that communal wealth should be spirited and starched way [sic] through corruption and economic crime.³¹

The critical issue addressed by the Court is the legitimacy of the right to privacy argument in the face of corruption allegations. It is clear that where information on corruption is sought, it is in the public interest not to hide behind the veil of the right to privacy. The Court affirmed the position that legal provisions on access to information are instrumental in the fight against corruption. However, later on in this chapter, it will be shown that even where the public interest is at stake, Kenyan courts have recently shown restraint in the interpretation of access to information provisions of Kenya's 2010 Constitution.

Under the immediate former Constitution and related judicial interpretations in the two cases, there has been positive jurisprudence on the right of access to information in Kenya. It should be recalled that prior to 2003, such decisions could never have been anticipated, partly because of the closed nature of a one-party state. There have since been further developments, especially after the enactment of the 2010 Constitution, and there will be occasion to review them in this chapter.

B. Classification of Information

Administratively, Kenya has regulations that classify information as: (a) top secret (b) secret (c) confidential and (d) restricted.³² Top secret documents contain information whose unauthorized disclosure can cause exceptional damage to the republic. Secret documents are those with content whose unauthorized disclosure can cause serious damage to the interest of the republic. Confidential documents are those whose unauthorized disclosure can cause extreme embarrassment to the republic. Finally, restricted information is information whose unauthorized disclosure would be undesirable to the interest of the republic. In addition, the government defines another

³¹ Ibid.

³² Nerissa Kamar, "Factors Hindering Effective Management of Government Information in Kenya," WSIS Follow-up Conference on Access to Information and Knowledge for Development (27–30 March 2006), United Nations Conference Centre, Addis Ababa, Ethiopia, <http://www.uneca.org/disd/events/2006/wsis-library/presentations/Factors%20hindering%20effective%20management%20of%20government%20information%20in%20Kenya%20-%20Nerisa%20Kamar%20-%20EN.pdf>.

category of documents as generally unclassified and whose access is limited to action officers within the public office that created them.³³ Arguably, this order of classification of information is to a large extent dependent on a subjective evaluation by the government official. In the absence of an objective evaluation or clear criteria of determining in which category information falls, free access to information can be hindered by bureaucratic red tape or uncalled for administrative procedures.

Related to the categorization of information, is the omnibus concept of “classified” information. Classified information is defined by the National Security Intelligence Act as information that is sensitive in nature and value that the unauthorized disclosure would lead to a security risk being posed to the state.³⁴ When one compares the definition of classified information with that of “top secret” and “secret information” already highlighted, one is tempted to assume that classified information includes the two. This is because the definition of what constitutes security risk is not very specific. “Security risk” could either mean that which has the potential to cause serious damage to the interest of the state or cause exceptional damage to the state. As observed by Justice Blacks in the case of *New York Times v. United States*, the word “security” is a broad, vague generality and should therefore not be invoked to abrogate the First Amendment law.³⁵ In Kenya, this uncertainty leaves room for discretion that could be abused.

C. Official Secrecy and Protection of Whistle-blowers

One of the laws that have been under attack by reform activists is the Official Secrets Act.³⁶ This Act has provided the basis for information disclosure or nondisclosure in Kenya for a long time. In many aspects, the law is seen as inhibiting the accountability of government to the public on claims of protecting the public interest. For example, the law makes it an offence for a person—a public servant—to pass on any official document issued for his use alone to anyone not authorized to receive it, whether or not the information has any reference or effect on the security of the state.³⁷ Apart from many other limi-

³³ Government of Kenya, Revised Code of Regulations (2006). http://www.dpm.go.ke/index.php?option=com_docman&task=cat_view&Itemid=&gid=8&orderby=dmdatcounter&asc=DESC.

³⁴ Act 11 of 1998, Clause 2.

³⁵ See 403 U.S. 723 (1971).

³⁶ CAP 187 Laws of Kenya (revised in 2009), <http://www.icnl.org/research/library/files/Kenya/Officialsec.pdf>.

³⁷ See M’Inoti Kathurima, “Access to Information under the Draft Freedom of Information Bill,” *The Standard*, Supplement (6 July 2007), 30.

tations of the Act, the law “does not recognize the defense of public interest and that even disclosure of information already in the public domain is still a crime.”³⁸ Furthermore, senior government officials are under obligation to ensure that civil servants in their respective offices are reminded of their duty with respect to the status of government documents.³⁹

In such a situation, there can be no protection of whistle-blowers. For instance, in 1992, Munyakei, who worked as a clerk at the Central Bank of Kenya, exposed a major corruption scandal commonly referred to as the Goldenberg scandal. Munyakei was sacked on allegations of violating the Officials Secrets Act. Touted to be a hero by human rights activists, Munyakei died a few years later without receiving justice.

Following the Goldenberg scandal, a commission of inquiry formed to inquire into the scandal ended up recommending the enactment of a witness protection law. The aim of the law was to protect whistle-blowers such as Munyakei. Subsequently, in 2007, parliament passed the Witness Protection Act, which was revised in 2012.⁴⁰ Today, Kenya has a witness protection program in place whose effectiveness will be judged based on the extent to which it protects whistle-blowers or key witnesses who would contribute to public interest issues.⁴¹

A review of a number of legislative reforms that had taken place after 2003 period, especially within the anti-corruption sector, shows that there is protection of persons revealing “official secrets” notwithstanding the Official Secrets Act. But such revelation receives protection only if it was done in the interest of the public. For instance, Clause 65 of the Anti-Corruption and Economic Crimes Act provides for protection of informers and investigators subject to their belief that the information they are relaying is true.⁴² However, the effectiveness of this protection is subject to a court’s determination of what is meant by “in the interest of justice.” In the meantime, the KACC (now the Ethics and Anti-Corruption Commission) has made progress by establish-

³⁸ Ibid.

³⁹ See Nerissa Kamar, “Factors Hindering Effective Management of Government Information in Kenya, Supra note 32 and Government of Kenya Revised Code of Regulations in Supra note 33.

⁴⁰ Act No. 16 of 2006 revised in 2012, http://www.kenyalaw.org/klr/fileadmin/pdf-downloads/Acts/WitnessProtectionAct_No16of2006.pdf.

⁴¹ The government recently announced the operationalization of the Act. This was probably due to the many commissions of inquiry that had been formed to investigate into the events leading to the December 2007 postelection violence. It was meant to encourage witnesses to come forward to present evidence before the commissions.

⁴² Act No. 3 of 2003. See also an analysis by Philip Kichana, “Protect Whistle Blowers,” ADILI (Transparency International Kenya), August 2006, <http://www.tikenya.org/documents/adili81.pdf>.

ing a web-based whistle-blowing system that guarantees the security of those who reveal corruption-related information.⁴³

Often, the Anti-Corruption and Economic Crimes Act is read together with the Public Officer Ethics Act⁴⁴ enacted during the same period. While the Public Officer Ethics Act complements the Anti-Corruption Act on the war against corruption, Clause 40 raises concerns. The clause criminalizes the “unlawful disclosure” of information by public servants and imposes severe penalties that include a fine not exceeding 5 million Kenya shillings (approx. US\$70,000) or imprisonment for a term not exceeding five years, or both. This provision makes uncertain the protection of informers under the Anti-corruption Act who happen to be public servants. While the latter encourages disclosure of information on corruption, the penalties in the former are prohibitive and discourage public servants from whistle-blowing.⁴⁵

D. Open Procurement Processes

Prior to 2003, institutional mechanisms to fight corruption were very weak. Apart from the recent laws on fighting corruption already highlighted, Kenya enacted the Public Procurement and Disposal Act to promote transparency in the market.⁴⁶ The law states that its objectives include increasing transparency, accountability and public confidence in those procedures relating to procurement and disposal of obsolete public property. Clause 54 of the Act specifically requires public agencies to publish tenders in newspapers, websites or any place accessible to the public. This is a commendable step toward making government business more open and transparent. However, it is important to note that for a while the procurement of security related equipment is considered a matter of national security and therefore not subject to the usual public procurement procedures. This is despite the fact that the budget allocation to the security sector is one of the highest. This approach has led to major corruption scandals, such as the infamous Anglo Leasing scandal, where Kenya was obliged to pay millions of US dollars for goods and services not delivered.⁴⁷

⁴³ Aaron Ringera Speech on the Official Launch of the Kenya Anti-Corruption Commission Reporting System, 12 October 2006.

⁴⁴ Act 4 of 2003.

⁴⁵ Philip Kichana, “Protect Whistle Blowers,” *Supra* note 42.

⁴⁶ Act No. 3 of 2005.

⁴⁷ Institute of Economic Affairs, “Unpacking Githongo’s Report on Corruption In Kenya, (2006).

E. Protection of Journalistic Sources

In 2007, an interesting debate arose in Kenya as to whether a journalist should be compelled to disclose the sources of her information in the course of legal proceedings. It was the same issue that the case of *Branzburg v. Hayes*⁴⁸ dealt with in the United States. While dissenting, Justice Stewart stated:

After today's decision, the potential informant can never be sure that his identity or off-the-record communications will not subsequently be revealed through the compelled testimony of a newsman. A public-spirited person inside government, who is not implicated in any crime, will be fearful of revealing corruption or governmental wrongdoing; because he will now know he can subsequently be identified by use of compulsory process.

The government of Kenya decided to formulate a law to regulate the media. When the Media Bill 2007 was debated in parliament, a clause that would compel journalists to disclose their sources of information had been “ingeniously” inserted in the bill “without consultation.” The bill was passed by parliament, but due to public uproar and concerted advocacy by the media and other groups, the president refused to sign the bill into law. He referred the bill back to parliament to expunge the offensive clause. It is not clear whether the president was informed by the ideals of protecting journalism or whether he was just reacting to political pressure.

F. Seeking Remedy for Nondisclosure

It is a principle of access to information that any person aggrieved by the non-disclosure of information by a public authority should be able to seek redress from an independent body.⁴⁹ In many jurisdictions, this role is vested in the Office of the Ombudsman or Information Commissioner. In Kenya, there is no Office of Information Commissioner. Nonetheless, in 2007 the government established the Office of the Ombudsman, known as the Public Complaints Standing Committee, whose mandate was to inquire into allegations of misuse of office, corruption, unethical conduct, inefficiencies, among other things, within the public sector.

⁴⁸ 408 U.S. 665 (1972).

⁴⁹ See Article 19, “The Public Right’s to Know: The Principles of Freedom of Information Legislation,” *International Standards Series* (1999), <http://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>.

Until 2011, the Office of the Ombudsman was seen as generally weak since it was not anchored in any legislation and the president was solely responsible for appointing the committee members. But this changed after the enactment of the 2010 Constitution. Article 59(4) of the Constitution and the Commission on Administrative Justice Act, 2011, provided the basis for establishing a more independent and robust Office of the Ombudsman (also known as the Commission on Administrative Justice). Although the mandate of the office does not expressly provide for access to information redress mechanism, it does not prevent anyone with such a complaint to approach it. Perhaps what is required is more public awareness on the mandate and flexibility on the part of the ombudsman to address issues of access to information.

The alternative redress mechanism is using the courts of law. Historically, Kenyan courts have been criticized for being ineffective and inefficient. The judiciary was long perceived as compromised and lacking in the independence required to delivering justice, more so on politically sensitive cases. However, in the first three years after the promulgation of the 2010 Constitution, progressive judicial reforms have been undertaken; leading to higher public confidence in the judiciary. Further, pursuing the normal court process to secure information is a time-consuming affair. In addition, the court may require a person to demonstrate interest in the information being sought. Finally, the court process requires the representation by lawyers, which in itself is expensive for ordinary citizens.⁵⁰

The case of *Roshanali Khimji Pradhan v. Attorney General* demonstrates some of the challenges of using the ordinary court process when seeking redress. Around the year 2000, a Kenyan farmer sued the government for compensation for its alleged statutory negligence to protect him and his property after the farmer had warned of an impending attack on his estate.⁵¹ What had happened was that there had been violence along the Kenyan coast. A number of people died and some lost their property. The farmer was one of those affected. Following the ethnic-based clashes, the government appointed the Akiwumi Commission of Inquiry to investigate into the causes of ethnic clashes in Kenya. The Commission submitted its report to the president on 19 July 1999.

The findings of the Commission were not made public. The farmer required the report of the Commission as part of the evidence he would rely upon in his case. He moved to the High Court to compel the government to release the report. The Court later ruled in favor of the farmer and ordered

⁵⁰ Although Article 22 of the Constitution (2010) gives a leeway for representation and instituting court proceedings.

⁵¹ See *Roshanali Khimji Pradhan v. Attorney General*, H.C. No. 276 of 1998, eKLR (2004), http://www.kenyalaw.org/CaseSearch/view_preview.php?link=5047912593006433187866&words=RoshanaliKhimjiPradhanvsAttorneyGeneral&mode=2.

the attorney general to release the report.⁵² The report was made public on 18 October 2002 amid protests by the attorney general that the report was biased. True to his expectations, the farmer used the report to win compensation from the government.⁵³ However, it is notable that the court process took three years and there were other additional costs before the information was released.

V. Kenya's 2010 Constitution and Access to Information

Kenya's Constitution, adopted in August 2010, has been touted as one of the most progressive constitutions around the world. The Constitution has provisions with far-reaching implications on access to information in Kenya. The right of access to information is anchored in Article 35 of the Constitution. The Constitution guarantees every citizen the right of access to information held by the state. Unlike the predecessor constitution, it also guarantees the right of access to information held by persons in their individual capacity as long as the information is required for the exercise or protection of the rights or fundamental freedoms of the requester.⁵⁴ The 2010 Constitution further entitles a citizen to have any untrue and misleading information about him or her corrected or deleted. Finally, it obliges the state to publish and publicize any important information that affects the nation. There is no doubt that Article 35 alters the way information was previously held and shared by government in relation to its citizens.

The 2010 Constitution also provides for freedom of expression and freedom of the media in Articles 33 and 34 respectively. With respect to the former, every citizen has the freedom to seek, receive and impart information and ideas, artistic creativity and academic and scientific freedom. In the case of the latter, the 2010 Constitution guarantees freedom and independence of electronic, print and all other types of media. It limits the power of the state to interfere or control the media. The issue of regulation and standard setting for the media is bestowed upon an independent body. These complementary freedoms to the right of access to information are generally liberal compared to those under the previous constitution.

⁵² See reference in *Biwott v. Judicial Commission of Inquiry into Tribal Clashes in Kenya*, H.C. Misc. Application No. 1269 of 2002, eKLR (2002), <http://kenyalaw.org/caselaw/cases/view/6779/>.

⁵³ *Roshanali Khimji Pradhan* case, *supra* note 51.

⁵⁴ In the case of *Peter M. Kariuki v. Attorney General* the Court held that the records regarding salaries and allowances of the petitioner and major generals cannot be classified as private or confidential. See *Peter M. Kariuki v. Attorney General* {Petition No. 403 of 2006, eKLR (2011)} <http://kenyalaw.org/caselaw/cases/view/77121/>.

But there are also limitations on access to information rights under the 2010 Constitution. Unlike the pre-2010 Constitution where vague terms such as national security, public health, public morality and others were included, the current Constitution is very specific. It states that the freedoms of expression and media cannot be extended to propaganda to war, incitement to violence, hate speech, advocacy to ethnic violence or discrimination. These limitations are informed by Kenya's own history of human rights violations arising from interethnic violence. As noted earlier, more than a thousand lives were lost following the 2007 post-election violence. There is evidence showing that the media played a catalytic role in the spread of propaganda and ethnic hatred in the run-up to the 2007 elections. Some media houses were also accused of outright bias during the campaigns. In the same vein, previous experiences were such that the state exercised significant control over the media. And so in order to strike a balance, the drafters of the Constitution paid maximum attention to the historical, social and political context of Kenya.

Kenyan courts have had the opportunity to make decisions on the right of access to information under the 2010 Constitution. Two cases are of great interest. First, in the case of *Famy Care Limited v. Public Procurement Administrative Review Board & Another*,⁵⁵ Famy Care Limited, a company incorporated in India, filed two applications in the High Court of Kenya which aimed at enforcing Article 35 of the Constitution in relation to a tender for the supply of family planning commodities to the Kenya Medical Supply Agency (KEMSA). The petitioner sought for minutes of the evaluation and technical reports of the tender from KEMSA and disclosure of any correspondence between the Pharmacy and Poisons Board and any of other party concerning a certain drug in the context of the tender. The information was meant to assist the petitioner to prosecute its case. However, the Court dismissed the application on the basis that the right of access to information as stipulated under Article 35 of Kenya's 2010 Constitution can only be enjoyed by Kenyan citizens and must be natural citizens and not corporations. The Court stated thus:

The right of access to information protected under Article 35(1) has an implicit limitation that is, the right is only available to a Kenyan citizen. Unlike other rights which are available to "every person" or "a person" or "all persons" this right is limited by reference to the scope of persons who can enjoy it. It follows that there must be a distinction between the term "person" and "citizen" as applied in Article 35.

⁵⁵ *Famy Care Limited v. Public Procurement Administrative Review Board & Another*, Petition 43 of 2012, eKLR (2013), http://kenyalaw.org/CaseSearch/view_preview1.php?link=70598333093745877794611.

In the second case of *Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company and Others*,⁵⁶ the petitioner, a publishing company, alleged that there had been a violation of its constitutional rights under Articles 33, 34, and 35 of the Constitution, by the fact that the 1st and 2nd respondents had failed to furnish the petitioner with the information allegedly necessary for it to publish articles on corrupt dealings in the 1st respondent. Article 33 deals with freedom of expression; Article 34 freedom of the media; and Article 35 deals with access to information. The Court had to determine whether in failing or refusing to avail the information demanded by the petitioner, the respondents were thereby violating any of the petitioner's constitutional rights. The Court affirmed the decision in the *Famy* case that Article 35 of the Constitution of Kenya only grants the right of access to information to natural citizens as of right and not corporations. The Court went further to state that:

While the importance of the media in promoting transparency, accountability and good governance in a free and democratic state cannot be over-emphasised, a balance has to be struck with the rights of others. This cannot be done where the media asserts, as of right, an entitlement to information from "another person" other than the State or State entities as a prerequisite for exercise of freedom of expression and freedom of the media under Articles 33 and 34 of the Constitution.

These two cases have elicited some criticism. On one hand, the courts have underscored the importance of access to information in a very elaborate way. But on the hand, the interpretation that only natural Kenyan citizens can enjoy the right under Article 35 presents some confusion. Some critics observe that this approach will exclude advocacy organizations from requesting information from state institutions.⁵⁷ Although from a legal point of view, public interest litigation is an open field and an individual supported by a corporate entity could as well seek for any information under Article 35. In fact, Article 22 of the Constitution provides for representative suits on behalf of individuals seeking to enforce their rights. Perhaps what the courts were saying is that corporations cannot enjoy rights and freedoms in the same way as individuals and therefore cannot claim those rights and freedoms.

⁵⁶ *Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company & Others*, Petition No. 278 of 2011, (2013) eKLR, http://kenyalaw.org/CaseSearch/view_preview1.php?link=32814989894189150344229.

⁵⁷ Khaseke Makadia Georgiadis, "The Emerging Jurisprudence on the Right of Access to Information in Kenya," <http://www.kenyalaw.org/klr/index.php?id=1150>.

VI. Conclusion

The foregoing review shows that Kenya is a democracy in transition. Taking into consideration the political history of the country, the last two decades seem to be the most significant in the evolution of access to information policy and practice. The enactment of the 2010 Constitution has fundamentally shifted ground toward greater enjoyment of the right to information. The courts have also had the occasion to interpret constitutional provisions on the right to information. While the courts have been more progressive in their decisions, there is still need to interrogate some of the decisions to ensure consistency and easy application in future.

The new constitutional dispensation also calls for review of current legislation to ensure they are consistent with the Constitution. From the analysis, it could be argued that some of the current statutory provisions are not adequate in protecting the right to information. There is need to harmonize provisions in the Officials Secret Acts,⁵⁸ the Public Officers Ethics Act, the Anti-Corruption and Economic Crimes Act and the Witness Protection Act. There are efforts toward enactment of the Freedom of Information law as well as a new media law. This has to be fast-tracked, taking into consideration the limitation of the existing laws and remits of recent judicial decisions. The administrative procedures left to the subjective interpretation by public officials in many ways limit access to information. Other than reviewing some of these procedures, training and recruiting competent government officials on the significance of access to information is required.

⁵⁸ In essence, this Act should be repealed.

Freedom of Expression in Ferment: A cursory Look at the Ethiopian Media Regime

YARED LEGESSE MENGISTU

I. Introduction

While Ethiopia is blessed with a colorful and long history, freedom of expression is only a very recent theme and even so its practice has for long been seriously marred. In a country where secrecy is the established cultural norm, it is no surprise that freedom of expression can be singled out as the most marginalized freedom. The death of Emperor Menelik II (1889–1993) was unabashedly hidden from the public for three years although his absence was apparent.¹

The dying illness of the late prime minister, Meles Zenawi, was also hidden from the general public until his absence was palpable because of an African Union meeting held in Addis Ababa where his presence was expected. Bereket Simeon, of the then–Minister of Government Communications Office, announced the illness of the prime minister and made it a point to mention that the governing party’s deep-seated culture of secrecy had prohibited the disclosure of facts about the situation of the prime minister.²

This chapter dwells more on the current media situation encompassing the Constitution and the various laws having to do with the freedom. It

¹ Jenny Vaughan, “Ethiopia Prepares First State Funeral in over 80 ears (AFP) – Aug 31, 2012 <http://nazret.com/blog/index.php/2012/09/01/ethiopia-prepares-first-state-funeral-in-over-80-yrs>.”

² Haile Mulu, “It is Reported that Meles’s Illness is Not Disclosed Because of the Culture of the EPRDF,” *The Reporter*, 22 July 2012. Ato Bereket made the announcement when journalists questioned if it was appropriate for Ethiopians to learn about the health situation of their prime minister from the foreign media.

attempts to show that while significant progress has been registered in institutionalizing and advancing freedom of expression, the situation leaves much to be desired. There will also be a discussion of the constitutional grounds for limitation of the freedom that have been used broadly to proscribe speech along a wider spectrum. The current Criminal Code is particularly noteworthy as it criminalizes, among others, defamation of governments and government officials and violation of the constitutional order.

The late Prime Minister Meles Zenawi, who ruled the country from 1991 up until 2012, has a lot of epic achievements against his name; nonetheless, one of his enduring legacies is his hostile stance toward the press. When the Ethiopian People's Revolutionary Democratic Front (EPRDF) came to power in 1991, it allowed the proliferation of press products on an unprecedented magnitude in the country's history. However, the honeymoon lasted shorter than expected and it came to a screeching halt when Press Proclamation 34/1992 was enacted.

This Proclamation marks a watershed moment as it proclaims: "Anyone who is an Ethiopian national may singly or jointly with other persons having Ethiopian nationality, carry on any press activity." This Proclamation is deemed to incorporate both the print and the electronic media. The Proclamation institutionalized press freedom for the first time although this same law was also instrumental in the violation of freedom of expression since a record number of journalists were jailed and fined for violation of its provisions.

The Proclamation was used by the government to muzzle the free press in a way that eclipsed journalists' gradual and evolving self-maturity. As such, the government and the press in Ethiopia do not seem to have a love-hate relationship; instead, they have locked horns in circular predator-prey relationship. Recently, CNN learned about an intercepted message among senior al-Qaeda operatives leading to the closing of US embassies and consulates across the Middle East and North Africa. CNN was requested by the Obama administration official "not to publish or broadcast additional details because of the sensitivity of the information." In a way that could not easily be replicated elsewhere, CNN complied.³

However, nothing equals in importance in its transformation of the media landscape as the May 2005 elections in Ethiopia that were touted by many pundits as "the first ever" founding elections. These elections were genuinely contested by all parties. Unlike previous elections, there were many credible international election observers and they witnessed an unprecedented voter turnout. However, the postelection period was marred by huge

³ Barbara Starr, Chris Lawrence, and Tom Cohen, "Intercepted Al Qaeda Message Led to Shuttering Embassies, Consulates," *CNN*, 5 August 2013, <http://edition.cnn.com/2013/08/04/politics/us-embassies-close>.

and repeated street protests contesting the officially declared electoral results that gave a landslide victory to the incumbent. The postelection saga not only left behind about 193 people dead but also the government's move to stem the unrest culminated in the jailing of prominent opposition figures and journalists.

By fully aligning themselves with the opposition that was hell bent on replacing the government by exploiting contested elections, newspapers circulating in the country reported scheduled protest dates and places. The activities of the news outlets during these times thus brought into a sharper focus the distinction between freedom and anarchy, between speech and conduct, and between the boundaries of constitutional law and criminal law.

Thus, May 2005 reworked the attitude of the government toward the free press and hence the period since 2005 marked a deteriorating path for the Ethiopian press. The government grew intolerant of the media and even revoked the accreditation of journalists from both the Voice of America and Deutsche Welle.

Along with leaders of the opposition, members of the free press were formally charged and convicted of serious crimes such as genocide and attempting to overthrow the government through unconstitutional means. After spending some 20 months in prison, opposition leaders and journalists were convicted, sentenced and later pardoned. According to the CPJ, the crackdown resulted in at least eight newspapers being closed by government pressure and members of the media fleeing the country to escape prosecution.

Journalists released on pardon do still have a Damocles' sword hanging over their heads that can fall and behead them any time.⁴ Hence, more than any other period in the history of the free press, 2005 stands out since it spelled a death knell for the press. According to one newspaper article, "the burial of the independent press was concluded in 2005."⁵

II. Current State of Media Law and Practice

In this subsection, the major laws that address issues of media are addressed, starting from the Constitution, and including some comparative background.

⁴ Pardon is "forgive and not forget" while amnesty is "forgive and forget." However, while all factors surrounding the case pointed in the direction of amnesty, the government chose the option of pardon.

⁵ Tilahun Aklilu, "The Dark Curtain Drawn on the Independent Press," *Feteh*, 27 Tahsas 2004, 8.

A. Revolutionary Democracy

As attested to by various policy documents published by the Tigrayan Peoples Liberation Front (TPLF) and the EPRDF, the official policy of the ruling party is “revolutionary democracy.” This policy has an overarching influence and it has metamorphosed into the flesh and bones of the Constitution and subordinate laws. Revolutionary democracy is, to a great extent, the equivalent of the model of “supervised democracy,”⁶ which is built on deep distrust of free choice by the people and a distrust of democracy itself. The zenith of this version of democracy is that it is antithetical to liberty and does not create a conducive environment for freedom of expression.

The ideological offshoot of revolutionary democracy is a developmental state which dictates that the prime goal of the state is bringing about development and thus development becomes the fundamental organizing principle of major government and private initiatives. In Ethiopia, the government has proclaimed that it is a developmental state where all other things (including freedom of expression) are perceived through the prism of development. As such, media and art (at time even religious establishments) should be developmental.

Developmental journalism has many versions. The Ethiopian version holds that the role of journalists is to cover the development activities of the state, but not its weaknesses. The Ethiopian News Agency (ENA) released a book entitled *The ABC of Journalism* in 2004. The book describes the main role of developmental journalism:

In addition to initiating the people for development, it includes a serious appraisal of the usefulness of governmental projects to the people and the locality. Also, it shows the discrepancies between planned projects and implemented ones; between goals professed by government officials and actual benefits accrued to the people.⁷

B. The Federal Democratic Republic of Ethiopia (FDRE) Constitution

The FDRE Constitution came into force in 1995. Even if its legitimacy is still subject of a heated debate, the Constitution generously guarantees all generation rights. The Constitution guarantees freedom of expression in Article 29. As part of the guarantee, the right to seek, receive and impart information

⁶ This prototype of democracy is the one that exists in Turkey and many Latin American countries.

⁷ Reeyot Alemu, “The Red Pen of the EPRDF” (2012), 121, citing *The ABC of Journalism* (Ethiopian News Agency, 2004).

has been upheld. Apart from guaranteeing the right, the Constitution also provides for the limitation grounds, arguably exhaustively. To concretize the guarantee and draw the contours, the Ethiopian parliament has passed the Mass Media and Freedom of Information Proclamation that has activated the right to seek and access information.

The constitutional provision explicitly prohibits restriction of the right based on content and effect (consequence). Hence, the Constitution adopted a truth-based approach instead of a consequence-based regulation of speech. The truth-based approach seems counterproductive in a country bedeviled by rampant diversity along a wider spectrum of ethnicities and religions. As has been argued elsewhere, it is very difficult to effectively regulate virulent ethnic slurs with the truth-based approach. Particularly, the truth-based approach, unlike the consequence-based approach, does not enable addressing metaphoric disparagement such as the insulting characterization of some ethnicities as “donkeys,” “snakes,” “cockroaches,” “locusts,” etc.

However, the prohibition of content-based regulation is a giant step forward in the protection of speech. Indeed, the government-owned Ethiopian Radio and Television Agency (ERTA) has also adopted the truth-based approach in its editorial policy. That seems to be why it is not unusual for viewers to see and listen to potentially inflammatory footage (such as a student using a page of the Quran as toilet paper or a Muslim burning the flag of the federal government). Hence, the cost, if not the impossibility, of ascertaining the truth has not been sufficiently heeded. And, of course, there is also the problem of “you can’t handle the truth” in a country such as Ethiopia where the truth itself might be the source of the problem and is not in the interest of long-term stability and interethnic and interreligious harmony. Similarly, France’s approach is predominantly truth-based as truth and good faith afford grounds for an exonerating defense, except where there is a violation of privacy.⁸

The FDRE Constitution exhaustively lists down only four grounds of limitation: the honor and reputation of individuals, the well-being of the youth, propaganda for war, and human dignity. Subsequently, a cursory discussion of each ground will follow.

1. THE HONOR AND REPUTATION OF INDIVIDUALS

Many countries have laws on defamation even if jail sentences are no longer usual and acceptable. Unlike the US, where tort law takes care of defamation only, in Ethiopia defamation of individuals is a crime in addition to the tort liability it entails.

⁸ András Sajó, *Freedom of Expression* (Warsaw, 2004), 45–46.

In the Ethiopian context, there is even a criminal law provision that deals with defamation of Ethiopian and foreign governments. This seems contrary to the most important function of speech as a means of self-government (critiquing governance). It is maintained that the traditional vote-centric conception of democracy is impoverished compared to the richer talk-centric conception. In a country where human rights rhetoric has not been matched by a human rights culture, any political speech or criticism of governments can be interpreted as defamation of governments. Recently, an editor-in-chief of a famous weekly, *Feteh*, has been charged with this offense and the case is still pending before the Federal High Court.⁹

In the US, the Sedition Act of 1798 made punishable, among others, “false, scandalous, and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States.” However, in *Near v. Minnesota* (283 US 697, 1931) the Supreme Court struck down a major part of the law and narrowed its application to prevent obstruction of military action such as the publication of the sailing dates of transports or the number and location of troops.

The US and many other countries have developed governmental self-confidence and outgrown their sedition laws. Even so, France still punishes criminal libel as well as criticism of court decisions and the disparaging of public authorities.¹⁰ In Ethiopia the sedition law is very much part of the current socio-cultural and political-legal fabric. One of the four counts¹¹ with which Temesgen Desalegn, editor-in-chief of the now-defunct weekly newspaper *Feteh* was charged with includes violation of Article 257 (a) of the new Criminal Code, for allegedly provoking “by word of mouth, images or writings” the crime of outrages against the Constitution or the constitutional order.

According to the charge, in the 29 August 2011 (Nehase 23, 2003 EC) issue of *Feteh* in a piece entitled “The Youth That Are Not Afraid of Death,” the defendant wrote: “Being young is a revolution, a change, courage” and described how the youth have dethroned Emperor Haile Selassie I and how oppressive and muzzling the current regime is. In the 2 February 2012 issue the defendant wrote another article, this one called “Let the One Who Is Afraid Turn Back,” where he wrote that young people are not afraid of anyone once they rise up, that the current situation of Ethiopia is infuriating, that the people have to rise up and take it to the streets and that there is only one, not nine deaths.

The second count is instituted for contravention of Article 244 of the Criminal Code that criminalizes defaming the government. According to this

⁹ *Public Prosecutor v. Temesgen Desalegn*, File No. 12387 (2012). The author of this piece has testified in court an expert witness in this case.

¹⁰ Sajó, *Freedom of Expression*, 50.

¹¹ *Public Prosecutor v. Temesgen Desalegn*, File No. 12387 (2012).

count, the defendant, as an editor-in-chief, allowed the publishing of an article by another person in the weekly *Feteh* edition of 29 July 2011 that defamed the government in an article entitled "Second-Rate Citizenship in Ethiopia, Until When?" The article allegedly accuses the government of pursuing a racist policy and carrying out mass murders and massacres against Ethiopians in many places at different times.

The third count of the charge cites Article 486 (a) of the Criminal Code and alleges that the defendant has committed the crime of "inciting the public through false rumors" by writing that the Synod¹² and the Ethiopian Islamic Affairs Council are the baptismal font of revolutionary democracy of the government. The article allegedly claims that religious demands are voiced because the government is interfering in religious affairs which manifested in the government appointing its cadres as the leaders of Islamic and Christian governing bodies in the country.

It is argued that political speech should be accorded "maximum protection," the only exception being *clear and present danger*.¹³ Hence, in the US and much of the free speech literature, a distinction between a legitimate criticism of government and the advocacy of subversion began to take shape gradually. In *Abrams v. United States*, the US Supreme Court affirmed that *clear and present danger* that can forthwith bring about certain substantive evils is not part of protected speech.¹⁴ This supplies a valid comparative handle on speech regulation in Ethiopia as the charges against Temesgen Desalegn and other journalists do not attempt to show such substantive evils, especially given the fact that Ethiopia is now at peace.

Professor Sajó has cogently remarked that "fear of subversion might paralyze speech, and therefore democracy."¹⁵ The *clear and present danger* test was gradually reformulated as to extend constitutional protection even to incitement if the probability of causing danger is low.¹⁶ Unlike incitement, mere advocacy is protected all the more. In the case of *Feteh*, the charge oscillated between mere advocacy and incitement; however, given the prevalent peace in the country, the happening of violence (on the 2005 postelection in Ethiopia and Arab Uprising scale) seems highly improbable. Besides, the fact that all the three counts involve political speech by a print media outlet demonstrates the anti-press stance.¹⁷

¹² The leadership body of the Ethiopian Orthodox Tewahido Church.

¹³ Sajó, *Freedom of Expression*, 29.

¹⁴ 250 US 444 (1951).

¹⁵ Sajó, *Freedom of Expression*, 30.

¹⁶ Sajó, *Freedom of Expression*, 30.

¹⁷ In *McCartan Turkington Breen v. Times Newspapers* (2000) 4 All ER 913, 926, the ECHR held that the greatest protection is accorded to *political expression through the media* since this is an inherent part of the democratic process.

Press maturity seems to need time to sprout. In connection with the 2005 elections conundrum, Ato Bereket Simon opined to foreign and domestic journalists that Ethiopia's is an infant democracy bound to make mistakes. The same logic should apply to the fledgling Ethiopian press. Even in mature democracies, the media are extended "journalistic latitude"¹⁸ and "margin of discretion."¹⁹

2. THE WELL-BEING OF YOUTH

This is also another ground of restriction of the freedom under the FDRE Constitution. Art. 640(1) of the Criminal Code criminalizes a vast array of conduct concerning "obscene or grossly indecent" writings, images, posters, films or other objects. Since this provision is situated in the section of the Code addressing morals, what is "obscene or grossly indecent" should be left open to *evolving standards of decency*. When these crimes are committed to sexually arouse a minor, such expression serves as an aggravating circumstance.²⁰

In *Miller v. California*, the US Supreme Court held that obscene materials that "appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value" do not deserve and receive First Amendment protection. In more or less the same way, Art. 642 of the Criminal Code of Ethiopia provides that works that are "purely artistic, literary or scientific" and whose purpose is not to inflame erotic feelings or lust are not considered as obscene or indecent. It seems that the US stance is more protective of speech as speech with *serious* artistic, literary or scientific value is protected even if it might appeal to prurient interest. On the contrary, Ethiopian law accords protection only to expression that is *purely* artistic, literary or scientific.

3. PROPAGANDA FOR WAR

Any propaganda for war is also a limitation ground. Detailed and sensitive information about US troops was not, according to the US Supreme Court, considered as constitutionally protected. This is where constitutional reason of state dictates the need to draw a clear line between anarchy and freedom. The German Constitutional Court was also presented with such a constitutional riddle in one case. The bottom line according to the Court is that "the necessity of military secrecy for state security and the freedom of the press

¹⁸ In many cases the ECHR has worked out this principle; to cite just one: *Thoma v. Luxembourg* (2003) 36 EHRR 21.

¹⁹ *R. (ProLife Alliance) v. BBC* (2003).

²⁰ Art. 640 (2) (c), Criminal Code.

are not mutually exclusive principles. . . . Rather, they are complementary, in that both are meant to preserve the Federal Republic.”²¹

The Criminal Code in Ethiopia contains a special chapter that addresses “crimes against the state.” Under this part are included crimes such as crimes against the Constitution or the constitutional order (Art. 238), obstruction of the exercise of constitutional powers (Art. 239), armed rising or civil war (Art. 240), and attack on the political or territorial integrity of the state (Art. 241). According to Article 36 of the Criminal Code incitement to commit a crime by persuasion or other means constitutes a crime. Hence, a person who speaks or writes about revision of the Constitution by overstepping the stringent, and arguably undemocratic amendment formula, might be held guilty of crimes against the constitutional order.

Under the criminal law of Ethiopia many forms of civil disobedience are thus assimilated to treason (an attempt to overthrow the Constitution or the constitutional order). In Ethiopia calls for sit-ins, for example, can easily be interpreted as acts of terrorism or an attempt to overthrow the constitutional order by unlawful means.

4. HUMAN DIGNITY

Human dignity is the fourth limitation ground contemplated by the Constitution. Human dignity has been explicitly enshrined or protected in Article 24 (1) of the FDRE Constitution just like the South African²² and German²³ constitutions. Nonetheless, it is used by the Constitution to limit freedoms of expression and of assembly. In constitutional systems where human dignity is considered as the foundation of rights, human dignity has also been used as a restriction ground. Professor Sajó contends, “Where dignity serves as a common underlying value of the legal system, speech that is seen as offensive to dignity will always rank second.”²⁴ Hence, it is argued that this two-edged sword nature of human dignity has made it a less reliable ground for protection of freedom of expression. As such, it seems difficult to perceive how the legislature can use this constitutionally imprecise ground to pass a law restricting the freedom. But still one can argue that the hate speech provision in the new Criminal Code (Art. 486) can be considered as having its constitutional basis on this limitation ground.

²¹ Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed. (Durham: Duke University Press, 1997) 400, citing the *Spiegel* case (1966) 20 BVerfGE 162.

²² Human dignity is one of the “founding provisions” of the South African Constitution, Art. 1.

²³ Basic Law of Germany, Art. 1.

²⁴ Sajó, *Freedom of Expression*, 19.

III. Speech Regulation in Ethiopia

Apart from the above limitations based on the enumeration of the grounds in the Constitution, there are the following time, place and manner restrictions embodied in various laws.

A. Hidden Censorship (Prior Restraints)

In Ethiopia, there are myriad laws that regulate speech one way or another without going into the content. Even if Art. 29 (3) of the Constitution forbids censorship there are various laws and practices that impose hidden censorship on the press. These laws relate to publishing, tax and other matters that affect the exercise of freedom of expression directly or indirectly. The weekly *Feteh*, which reportedly contained material on the whereabouts of the late prime minister Meles Zenawi while he was on his deathbed, was not allowed to be published by the government-owned Berhanena Selam Printing Press. This is content based censorship even if the Constitution forbids censorship (Art. 29 (3)) and content-based regulation (Art. 29 (6)).²⁵

There are two government printing presses in Ethiopia, namely Berhanena Selam and Bole Printing Press. Bole Printing Press has made an official, albeit unwritten, rule that it does not publish political newspapers.²⁶ This policy is blatant content and viewpoint discrimination by a government-owned enterprise and is no doubt violative of the constitutional prohibition. However, this publishing policy of a government enterprise has been left unchallenged and is still the working practice.

Berhanena Selam is another government-owned printing press, but since it is government owned it can be used to conduct some censorship. All private printing presses do not possess the capacity to publish more than 10,000 copies at a time. Besides, while Berhanena Selam can print 30,000 copies overnight, the private printing presses need at least three working days to print 10,000 copies. This means that the government, through its printing presses, holds the ultimate monopoly over cost and content of publication.

Berhanena Selam has at times forbidden certain print products to publish certain information. A case in point is the recent order by the Ministry of Justice communicated to the printing press not to deliver the printed copies of the Friday weekly *Feteh*, allegedly for including a piece on the health situation of the late prime minister Meles Zenawi. As such, about 30,000 copies of the

²⁵ Art. 29(6) stipulates that freedom of expression cannot be “limited on account of the *content or effect* of the point of view” (emphasis mine).

²⁶ Interview with Temesgen Desalegn, 14 August 2013.

newspaper, whose publishing costs were ETB 80,385 (US\$ 4,295), were locked up by the printing press.²⁷ Whether the case goes to court is moot since the newspaper has been out of circulation ever since.

Another case of prior restraint that the independent press is suffering from is the staggering and near prohibitive cost of publication. The independent press in Ethiopia has not yet attracted enough capital or talent. The government-owned Berhanena Selam Printing Press publishes the government-run dailies and weeklies. The government has time and again decried the irresponsibility of the free press, even if one way of fostering responsibility is to relieve the free press of the crushing financial burden under which it flounders. The free press in Ethiopia is hunkering under the cost of publishing; the market has forced readers to rent newspapers instead of buying them. This means less income for members of the free press and hence a reduction in the quality of the print media and vicious cycle suppressing the development of related skills and talent.

While the price of magazines four years ago was hovering around 4 birr, now the price of magazines has gone up to 10 or 12 birr. Publishing houses are using the reason or pretext of the skyrocketing price of pulp worldwide to raise the cost of printing. To make matters worse, the government has not lifted a finger to relieve the press of this burden by, for example, giving tax relief or at least tax reduction. Hence, the print media are using more advertisements and less coverage of issues just to stay afloat.²⁸ Contrary to the adage, “a tax on newspapers is a tax on knowledge” newspapers are being directly or indirectly taxed in Ethiopia.

B. The Anti-Terror Proclamation (Proclamation No. 652/2009)

Ethiopia had its share of terrorist attacks on its soil. While many instances of terrorism can be recited here, the assassination attempt on former Egyptian president Hosni Mubarek is a valid case in point. However, this law is now being used against opposition figures and journalists in a way that is not conceivable in democratic systems. The organ of the TPLF, *Addis Raey*, in its March-April 2013 issue has brazenly claimed the law’s importance to shrink the political space for those who plot to overthrow the constitutional order by force.²⁹

²⁷ Wudneh Zenebe, *the Ministry of Justice Suspended Feteih*, Ethiopian Reporter, 18 Hamle 2004.

²⁸ Haile Giorgis Mamo, “The Broadcast Study,” *KumNeger Magazine*, 12.158 (August 2013), 5–6. A 2 percent tax increase on press products in the US in the 1970s had stirred the public to hold public demonstrations under the rallying cry, “Tax on paper is tax on knowledge.”

²⁹ Temesgen Desalegn, “The Anti-Terror Law: A Stick to Beat Those Who Are Hated,” *Fact* August 2013, citing *Addis Raey*.

In a charge dated 30/02/04 EC, the public prosecutor has instituted a case against 24 individuals, most of whom are journalists. The charge contains six counts of terrorism against individuals who allegedly committed the crime of terrorism through a combination of conduct and speech. The charges state that the journalists have violated the anti-terror proclamation, Arts. 4, 3 (1), (2), (3), (4) and (6) and Criminal Code Art. 252 (1) (a) and committed, among others, conspiracy to commit acts of terrorism and espionage “using their constitutional freedom of expression as a cover” by using ESAT TV and radio and sending inciting pieces from abroad to Ethiopia by mail. The charges clearly indicate that the charged crimes were committed predominantly using ESAT³⁰ TV, ESAT Radio, email and the website <http://www.addisnegeronline.com>.

In another case the public prosecutor brought criminal charges against prominent journalists and opposition figures for committing acts of terrorism, espionage and an attempt to overthrow the constitutional order by force. To cite just a few, Eskidner Nega is sentenced to 18 years in prison; Reeyot Alemu to 4; Wubshet Taye to 14.³¹ Two Swedish freelance journalists, Martin Schibbey and Johan Persson, charged with conspiracy to commit acts of terrorism under a different charge, were also sentenced to 11 years in prison, allegedly for violating this law even if they have been pardoned and released long before the end of their sentence.

The law provides for the punishment of individuals who engage in incitement to terrorism. The law defines terrorism in an overbroad way and the definition given to incitement is also problematic. According to the law, incitement includes using various ways to induce another person “to commit an act of terrorism even if the incited offense is not attempted.”³² This represents a major deviation from the core concept of traditional criminal law where incitement, as an inchoate offense, is punishable only in cases where the main crime is at least attempted.³³ Many countries have assimilated the crime of incitement to terrorism; however, punishing one for an offense that is not even attempted will stretch so far as to punishing speech or communication that is less likely to produce “imminent lawless action.”

When the Swedish journalists in Ethiopia were convicted, there was a widespread outcry, from far and near, that basically claimed that “reporting is

³⁰ ESAT (Ethiopian Satellite TV and Radio) is transmitted to Ethiopia and elsewhere from the US via satellite dish.

³¹ Ibid.

³² Art. 2(6).

³³ There are certain exceptions to this notion; UK law, for instance, contains the *offence of incitement* to religious hatred. *Inciting* another person to commit a crime was a misdemeanor at common law and in such cases the *offense* is committed even though the other person does not commit the basic crime. Thomas J. Gardner and Terry M. Anderson, *Criminal Law*, 11th ed. (Belmont, CA: Wadsworth Cengage Learning, 2012), 277.

not terrorism.”³⁴ These journalists were arrested not for live transmission but reporting about the activities of organizations categorized as terrorist groups. It seems that the theme of terror is not precluded from the purview of constitutionally protected speech. Indeed, covering terrorism is a potent means of combating terror; one can’t keep a lid on all criminalized activities. Besides, Art. 29 (6) of the Constitution provides that speech cannot be prohibited on account of the content “of the view expressed.”

The anti-terror law provided a context where the spiraling and complex relationship between national security and liberty are finessed. However, for the most part, national security is often played as the ultimate trump card.

C. Ethiopian Defamation and Hate Speech Law

It is generally argued that some prior restraints are constitutionally allowed even if they fall under an exception; it is argued with equal fervor that “a democratic society cannot long survive if prior censorship by government is commonplace.”³⁵ One prior restraint involves laws forbidding hate speech. Proclamation No. 34/1992 had provided that the press is tasked with ensuring that the content of their products are free from “any defamation or false accusation against any individual, nation/nationality, people or organizations.”³⁶ It can also be observed here that the Ethiopian approach to speech regulation is not consequence-based as can be seen from the wording “defamation or *false* accusation.” Besides, it criminalized “any criminal instigation of one nationality against another or incitement of conflict between peoples.”³⁷ The current criminal law has criminalized hate speech on the basis of political, racial or religious affiliations.³⁸ However, the Code omitted ethnicity from forming a basis of criminal liability for hate speech. According to Ethiopian law, truth is a defense to defamation except in the unlikely case where “intent to injure” can be proven. The incitement part of the law does not link the crime to truth and it thus seems that incitement, subjectively understood by the court, is punishable in all cases without truth foregrounding as a defense.

The Criminal Code, Article 613, provides that defamation of any one constitutes a crime. Truth is a defense if “the intent to injure” is lacking³⁹ while defamation “with knowledge of falsity” is punishable, even if it is com-

³⁴ “US to Ethiopia: ‘Reporting Is Not Terrorism,’” *Ethio News* 24 <VOA Editorial: Dec. 29, 2011>, <http://www.ethionews24.com/u-s-to-ethiopia-reporting-is-not-terrorism>.

³⁵ Media Law, 2008, 62.

³⁶ Proclamation No. 34/1992, Art. 10(b).

³⁷ Proclamation No. 34/1992, Art. 10(b).

³⁸ Criminal Code, Art. 486(b).

³⁹ Criminal Code, Art. 613(1).

municated negligently.⁴⁰ Besides, Ethiopian law accords heightened protection to public officials while their protection has to pass a higher *the actual malice standard* in the US. It is argued that an attempt to protect the reputation of politicians might severely stifle political criticism of the government.⁴¹

Besides, Ethiopian law makes truth the only available defense. In the US, even civil liability is predicated squarely on *actual malice* which means that some false is protected as a step to truth. The US Supreme Court held an unequivocal stance that truth is not easily achievable and hence “erroneous statement is inevitable in free debate.” This is all the more true in Ethiopia where truth mining is a very costly enterprise. However, in Ethiopia defamation exists in the absence of intent and whenever there is any false.

The tort doctrine of fair comment in the US also accords protection to opinions and, to a lesser degree, false statements. While there can be good or bad opinions, one cannot talk of true or false opinions. Therefore, sound and fair opinions should be constitutionally protected without imposing the unattainable burden of proving the truthfulness of opinions.

Unlike the United States, in Ethiopia, no distinction is made between private individuals and public figures and hence defamation against public officials is not assessed on an “actual malice standard.”⁴² Indeed, the Criminal Code of Ethiopia contains a provision on calumny thereby heightening the protection accorded public officials. Other than government officials, Ethiopian defamation law does not attach any peculiarity to public figures of any kind, including celebrities.

D. Flag Burning

In *Texas v. Johnson* (491 US 397) a deeply divided US Supreme Court held that flag desecration, especially in a political context, is a constitutionally protected form of speech. Section 90(1) of the German Criminal Code provides that anyone who “disparages the colors, flag, coat of arms or the anthem of the Federal Republic of Germany or one of its Lander, shall be punished with imprisonment for not more than three years or a fine.” The German Federal Constitutional Court held that the legislature can forbid flag desecration reasoning that the flag serves an important means of [political] integration through the principal state goals which it incorporates.

⁴⁰ Criminal Code, Art. 613(2).

⁴¹ Sajó, *Freedom of Expression*, 31.

⁴² *New York Times Co. v. Sullivan*, 376 US 254 (1964).

Nations such as Austria, Denmark, Finland, Germany, Israel, Italy, New Zealand, and Switzerland have penalized flag desecration.⁴³ Article 244 of the Criminal Code criminalizes flag desecration. While the logic of the American Supreme Court in protecting flag desecration is easy to follow, punishing flag desecration in such other nations is equally understandable. In countries such as Ethiopia plagued by deep diversity, the importance of the flag as a symbol and ingredient of unity cannot be overemphasized because resources and tools for nation-building are few and far between.

*E. Freedom of the Mass Media and Access to Information Act
(Proc. No. 590/2008)*

Freedom House has lauded this law as “the most progressive press law on the continent” while conceding that its implementation has been beset by different practical problems.⁴⁴ The law attempts to tackle media concentration and foster media pluralism and diversity. Article 7 (1) and (2) of the Proclamation provide that any person having direct or indirect effective control over a company possessing a nationwide broadcast or periodical license over an area with a recorded population of more than 100,000 inhabitants is not allowed to have direct or indirect effective control in another company servicing the same or overlapping market. The law provides separately, in two sub-articles, about broadcast and periodicals, which means that cross-ownership across media platforms is permissible.

The main concerns regarding this law relate to the broad discretion held by the government with regard to registration⁴⁵ and licensing of the media and excessive fines reaching up to 200,000 birr (approximately US\$10,000) for violations of even technical requirements of the law.⁴⁶ The law also includes a separate section (Part Four) outlining the “rights and responsibilities of the media,” which, however, is more of a responsibility. Under this section is included the duty of reply and correction which requires the editor-in-chief (or the deputy editor) to publish free of charge and “without correction” a required reply.⁴⁷

The law also provides for impounding a media product before its dissemination if it is deemed, by the federal or regional prosecutor, to pose “a

⁴³ Robert Justin Goldstein, *Burning the Flag: The Great 1989–1990 American Flag Desecration Controversy* (Kent, OH: Kent State University Press, 1996), xiii.

⁴⁴ Tracy J. Ross, “A Test of Democracy: Ethiopia’s Mass Media and Freedom of Information Proclamation,” *Penn State Law Review* 114.3 (2010): 1047, 1060.

⁴⁵ Art. 9(1) and (3).

⁴⁶ Art. 49(1) to (4).

⁴⁷ Art. 40(1)(a) and (c).

clear and present grave national security.”⁴⁸ This provision has been used to ban and subsequently close the weekly newspaper *Feteh*, which had been one of the most critical, well-informed and widely read newspapers in Ethiopia.

The newspaper’s front page contained articles on the health of the late prime minister and protests of Muslims in Ethiopia. The State Minister for Justice wrote a letter to Berhanena Selam to ban this particular issue. The case went to the Federal First Instance Court and the Court endorsed the ban and vindicated the ministry. Although the ministry is not empowered by law to ban the paper permanently, because of the wrangling that ensued between the newspaper and the ministry, subsequent issues were not released, which practically shut down the newspaper.

Following this turn of events, *Feteh’s* editor-in-chief, Temesgen Desalegn, launched a new independent bimonthly, the *Addis Times*, but the Ethiopian Broadcast Authority suspended the publication in January and rejected its application for the renewal of a certificate necessary to hold a printing license. Authorities cited the failure of the *Addis Times* to comply with administrative procedures, including delivering copies to the national archive and publishing the names of its shareholders.⁴⁹

Berhanena Selam also refused to print *Finote Netsanet*, a prominent weekly newspaper and the official organ of the Unity for Democracy and Justice Party (UDJ). In April 2012, Berhanena Selam announced that it would refuse to print any material it believed would violate the country’s 2009 anti-terrorism law.⁵⁰

F. Broadcast Proclamation (Proc. No. 533/2007)

The immediate, powerful and pervasive effect of the broadcast media and the frequency-scarcity rationale have shaped the legal regime governing broadcast and this logic applies even with greater vigor in a country like Ethiopia where ethno-linguistic and religious strife is rife. The need to avoid wastage of limited frequencies and the intractable religious and ethnic strife in this country and the use of politics as a proxy for finessing inflammable religious and ethnic conflicts have resulted in severely restrictive broadcast regulation.

In the “Fourth Broadcasting Case,” the German Constitutional Court has outlined the special nature of the broadcast media, given “the scarcity

⁴⁸ Art. 42(2).

⁴⁹ Committee to Protect Journalists, “Charges Renewed against Ethiopian Journalist Temesgen,” CPJ website, 8 February 2013, <http://www.cpj.org/2013/02/charges-renewed-against-ethiopian-journalist-temes.php>.

⁵⁰ “Berhanena Selam Refuses to Print *Finote Netsanet* Newspaper,” *Awramba Times*, 31 August 2012, <http://www.awrambatimes.com/?p=2946>.

of available frequencies and the extraordinarily high financial prerequisites for the production of broadcasts.”⁵¹ The overriding concerns in the area of broadcast law include, among others, the need to prevent one view dominating public opinion (“the emergence of predominant power over opinion”) and inclusion of opinions covering the whole spectrum, especially minority views. However, the Court added a caveat that only through material, organizational and procedural provisions can plurality and balance in programs be attempted to be achieved. One such way is mitigating media concentration which is included in the Ethiopian press and broadcast laws.

The broadcast proclamation has established the Ethiopian Broadcasting Authority (EBA) to control broadcasting activities. The Authority is tasked with overseeing licensing and is also vested with supervisory and regulatory powers over program standards and compliance with permit condition(s).

The law recognizes public (government),⁵² commercial and community broadcast services. A public broadcast license is issued to those aiming to deliver national or region-focused broadcasts. A commercial broadcast license is issued to business organizations with legal personalities and operating broadcast services for profit.

EBA also serves as a regulatory agency with respect to the press industry. Art. 16(3)(d) of the Proclamation requires all broadcasting outlets to register, including the print media. That is why the government banned the newspaper *Feteh*. The owner of *Feteh* then had to buy another print media license for the *Addis Times* magazine and continue his publication under a different name, which was again closed by the government.⁵³ After the *Addis Times*, *Feteh* was relaunched under a different name, *Leelena*, where the first issue states, “We are back again.”⁵⁴

According to the Proclamation and subsequent regulation, EBA is accountable to the prime minister.⁵⁵ In contrast, in the US, the FCC is an independent agency directly *accountable to* Congress.⁵⁶ The Declaration of Principles on Freedom of Expression in Africa, adopted by the Ordinary Session of the African Commission on Human and Peoples’ Rights, under-

⁵¹ BVerfGE 73, 118 1 BvR 1/84 4, Rundfunkurteil “Fourth Broadcasting Case.”

⁵² The BBC is established by a Royal Charter instead of an Act of Parliament. Three bodies are responsible for its running, governing and regulation: The BBC Trust, the BBC Executive Board and Ofcom (the communications regulator, the equivalent of EBA).

⁵³ Because of the reputation of *Feteh* writers, the *Addis Times* and *Leelena* openly declared that these print media were indirectly owned and operated by the “family of *Feteh*.”

⁵⁴ *Leelena* 1.1, 2 March 2013.

⁵⁵ Art. 11(2), Council of Ministers Regulation No. 158/2008, Government Communication Affairs Office Establishment Council of Ministers Regulation.

⁵⁶ After 1933, the National Socialists used the established centralized broadcasting system as a propaganda tool.

scores the need for transforming state or government broadcasters into authentic public broadcasters.⁵⁷ Centralized broadcast agencies are often used, including in Ethiopia, to impose orthodoxy and feed the general public a steady diet of nonpluralistic and monolithic propaganda.

EBA has the power to issue, suspend and cancel broadcast licenses.⁵⁸ It is empowered to control and prohibit illegal transmission.⁵⁹ And one of its duties is to “ensure that the broadcasting service is conducted in a manner that contributes to the proper social and economic development of the country.” Here again, one can see the pervasive ideology of developmental state and developmental media that informs media governance in Ethiopia.⁶⁰

Even so, the law forbids certain class of people from applying for a broadcast license; these include mainly bodies not having legal personality, foreigners, foreign companies and companies owned or effectively controlled by foreigners or political parties and religious organizations.⁶¹ However, even when a license is forbidden in such cases, these people can use a backdoor arrangement (like buying air time) to get on the air.

Also, in a bid to foster media pluralism, the law forbids the issuance of a license to “an organization of which more than 50% of its capital is held by another organization which carries on the business of printed press or news agency or a person that owns more than 20% of the capital of such organization.”⁶² In the same way, a license will not be issued to an organization applying for a television broadcasting service license which already had a license for a television broadcasting service or more than one license for radio broadcasting services.⁶³ A radio broadcast organization will not be issued an additional radio broadcasting service license if it already has a license for radio broadcasting services in the same license area or two licenses in different license areas.⁶⁴ However, the law did not address the media concentration and cross-media ownership⁶⁵ of public (government) broadcasts.

⁵⁷ Article 19, 2006.

⁵⁸ Art. 7(2).

⁵⁹ Art. 7(5).

⁶⁰ Developmental media theory holds that the media should support an existing political regime and its efforts to register national economic development. According to a study conducted by the EBA, the origin of developmental journalism is “civic journalism” that surfaced in the US in the 1960s. Developmental journalism dominates media landscape in countries such as India, Philippines and Indonesia (Stanley J. Baran and Dennis K. Davis, *Mass Communication Theory: Foundations, Ferment and Future*, 5th ed. [Boston, MA: Wadsworth, 2009], 122).

⁶¹ Art. 23(1) to (4).

⁶² Art. 23(6).

⁶³ Art. 23(7).

⁶⁴ Art. 23(8).

⁶⁵ Cross-media concentration is a situation whereby one media type controls through cross-ownership different media outlets in different media markets and industries.

Article 30 particularly imposes on the licensee the duty to reflect different and balanced viewpoints in its programs and to ensure the accuracy of the content and source of any program. Besides, any program intended for transmission may not: violate the dignity and personal liberty of mankind or the rules of good behavior or undermine the belief of others; commit a criminal offense against the security of the state, the constitutionally established government administration or the defense force of the country; maliciously accuse or defame individuals, nation/nationalities, peoples or organizations; cause dissension among nationalities or instigate dissension among peoples; or incite war.⁶⁶

The law also forbids the transmission of programs that may contravene the well-being of children. As such, any program that may corrupt the outlook of children or is likely to lead them to “undesirable behavior” cannot be transmitted between 11 o’clock in the evening until 5 in the morning.⁶⁷ The law attempts to regulate content by requiring nationwide broadcasts to devote at least 60% of their weekly transmissions to national problems; regional programs should allocate 60% of their transmission to regional programs; and local programs should allocate 60% of their transmission to local programs. This seems unwarranted content regulation contrary to the constitutional prohibition of content regulation.⁶⁸

In the “Fourth Broadcasting Case,” the German Constitutional Court upheld the programming freedom of producers. The Court reasoned that Article 5(1), second sentence, Basic Law accordingly protects not only against direct influence on *the selection, content and form* of programs but also against influence that might affect programming freedom indirectly.⁶⁹ Contrarily, the Ethiopian law eroded much programming freedom. *Ethiopikalink*, a local radio show, was removed from air by the licensee, Zami 90.7 FM, allegedly for a negative covering on the late prime minister. As such, it was taken off air from August 2012 until February 2013.

IV. Conclusions

The late prime minister left behind a checkered legacy despite the ruling party’s one-year, relentless propaganda to make him appear immaculate.⁷⁰ Starting from earlier times and since before the present government came to power,

⁶⁶ Art. 30(3).

⁶⁷ Art. 31(1) and (2).

⁶⁸ Art. 32.

⁶⁹ BVerfGE 59, 231 (260).

⁷⁰ One writer labeled the late primer minister the “architect of press-squelching laws” (Mohammed Ademo, “Zenawi’s Legacy and the Future of Free Press in Ethiopia,” *Colombia Journalism Review*, 25 August 2012, http://www.cjr.org/behind_the_news/zenawis_legacy_and_the_future.php?page=all).

Ethiopia had a “propaganda minister”—in the name of Ministry of Information (until the office was abolished in 2010). Now, the Government Communications Office is doing the job of the former Ministry of Information.

In Ethiopia censorship was officially outlawed by the Transitional Period Charter of 1991. The press law of 1992 had also abolished censorship or any restriction on freedom of the press. However some people argue that the power of the government to enjoin press products under the press laws of 1992 and 2008 forms part of censorship. Permit requirements, license, exceptional taxes, and registration can also curtail freedom of the press. However when registration is required as a source of information for ex post facto liability, it should not be used as a form of censorship.

Even if Press Proc. 34/1992 was restrictive it continued in force until 2005. Besides, even if the law was used to fine and jail many journalists, the latter continued their journalistic work through sheer force of will. Ethiopian journalists are still riding through the storm and the free press has largely survived the malicious prosecutorial onslaught.

The prosecution in Ethiopia did not for long have a coherent prosecutorial policy and nearly every alleged criminal violation was dumped on the Court. It is not unusual for an innocent person to be convicted of a serious crime because of lazy, arrogant and malicious prosecution in Ethiopia. The prosecutors often failed to assess the merit of their case and even in situations where cases did not show “reasonable suspicion” or “probable cause” the prosecution simply reasoned, “if need be, let the court free him.” However, judges are often pro-prosecution; courts in Ethiopia are less competent and semi-independent which contributed to the dark cloud hanging over the free press. Judges are not totally free from the influence of the government since they are for the most part appointed because of their political affiliation with the government. Besides, judges, in most cases, do not have a working knowledge of the constitutional importance of freedom of expression, much less the breadth and width of the freedom. Hence, such practical circumstances dictate self-censorship on rational humans.

While the government fares less well when it comes to expanding the democratic space and giving rights their due in the political life of the country, none equals the marginalization and obliteration of freedom of expression. As such, freedom of expression remains one of the most trampled and victimized rights on the political landscape of Ethiopia, with a dim prospect of bettering anytime soon.

Philippines: Expanding the Contours of Free Speech in an Environment of Impunity against Journalists

GILBERT T. ANDRES

This Court cannot tolerate the blatant disregard of a constitutional right even if it involves the most defiant of our citizens. Freedom to comment on public affairs is essential to the vitality of a representative democracy. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

—*David v. Arroyo* (G.R. No. 171396, 3 May 2006)

I. Introduction

The Philippines prides itself of having a liberal–democratic free speech and free press legal structure. The Bill of Rights of the Philippine Constitution protects the right to freedom of speech and of the press:

Section 4. No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.

The right to information is also constitutionally protected in Section 7 of the Bill of Rights of the Philippine Constitution:

Section 7. The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.

Nevertheless, the great irony is that the Philippines has been tagged as one of the deadliest countries for journalists. In its 2013 release, the Committee to Protect Journalists ranked the Philippines third worst in its Impunity Index, with 71 murdered journalists since 1992.¹ The worst case of impunity in the

¹ Committee to Protect Journalists, “Getting Away with Murder,” 2 May 2013, <http://cpj.org/reports/2013/05/impunity-index-getting-away-with-murder.php#index>.

Philippines happened in 23 November 2009, when 58 persons, including 32 journalists and media workers, were brutally murdered in the hill of Sitio Masalay, Brgy. Salman, Ampatuan municipality, Maguindanao. Infamously known as the Maguindanao massacre, it was described by the Committee to Protect Journalists as the “single deadliest event for the press since 1992.”² The prosecution of the 196 accused in the Maguindanao massacre is still ongoing.

During the nine-year administration of President Gloria Macapagal-Arroyo, at least 60 journalists were killed.³ Despite the inauguration on 30 June 2010 of President Benigno Simeon Aquino III, who is expected to be sensitive to human rights issues,⁴ the extrajudicial killings of journalists still continue with 27 journalists killed to date.⁵

It is depressing to note that there was an instance when 3 Filipino journalists were killed in a mere three-day period: newspaper columnists Richard Kho and Bonifacio Loreto were both shot dead on 30 July 2013 in Quezon City, while freelance news photographer Mario Sy was shot dead on 1 August 2013 in front of his wife and child in General Santos City.⁶ Regrettably, these attacks still show that the Philippines is a dangerous place for journalists. The message is clear: You’re free to write or say what you want, but you’ll pay with your life.

But despite this depressing atmosphere of impunity against journalists, there is still some glimmer of hope from Philippine free speech jurisprudence—that it can be a legal resource for other countries.

In this chapter, we discuss how the Philippine Supreme Court expanded the contours of free speech in the Philippines by analyzing two cases and the peculiar socio-political circumstances that led to these cases: *David v. Arroyo*⁷ and *Chavez v. Gonzales*.⁸

We also discuss the flip side—a UN treaty body’s view against the Philippines. On 26 October 2011, the UN Human Rights Committee adopted

² Committee to Protect Journalists, “Maguindanao death toll worst for press in recent history,” 25 November 2009, <http://cpj.org/2009/11/maguindanao-death-toll-worst-for-press-in-recent-h.php>.

³ See Committee to Protect Journalists, “74 Journalists Murdered in Philippines since 1992,” <http://www.cpj.org/killed/asia/philippines/murder.php>.

⁴ The father of President Aquino, the late Senator Benigno “Ninoy” Aquino, Jr., was an opposition stalwart during the martial law regime of Philippine dictator Ferdinand E. Marcos. Ninoy was gunned down on 23 August 1983 on the tarmac of the Manila International Airport. Sixteen officers and enlisted men of the now defunct Aviation Security Command (Avsecom) were convicted for the murder.

⁵ Amita Legaspi, “Palace, media groups condemn killing of Tawi-Tawi journalist,” *GMA News Online*, 6 May 2014, <http://www.gmanetwork.com/news/story/359773/news/nation/palace-media-groups-condemn-killing-of-tawi-tawi-journalist>.

⁶ Agence France-Presse, “3 Journalists Killed in 3 Days,” *Inquirer.net*, 3 August 2013, <http://newsinfo.inquirer.net/457675/3-journalists-killed-in-3-days>.

⁷ G.R. No. 171396, 3 May 2006.

⁸ G.R. No. 168338, 15 February 2008.

a landmark view in *Adonis v. The Philippines*,⁹ stating in part that “in the present case the sanction of imprisonment imposed on the author was incompatible with article 19, paragraph 3, of the Covenant.” We discuss the legal implications of this view.

Of course, this chapter will be incomplete unless we discuss the new frontier of free speech advocacy: the Internet. We end this chapter by discussing how Filipino free speech defenders constitutionally challenged the cyber-libel provision of the Philippine Cybercrime Prevention Act of 2012, and even the 82-year-old libel provision in the Revised Penal Code.

II. *Prof. Randolph David v. Gloria Macapagal-Arroyo* (G.R. No. 171396, 3 May 2006)

A nation’s adherence to free speech is severely tested in times of national emergency, whether such emergency is imaginary or real. In the Philippine Supreme Court case of *David v. Arroyo*,¹⁰ one of the legal issues tackled was whether a state of national emergency justifies restrictions on freedom of speech and of the press. President Gloria Macapagal-Arroyo declared a state of national emergency on 24 February 2006. Ironically, it was the eve of the 20th anniversary of the EDSA I People Power Revolution,¹¹ when Mrs. Arroyo issued Presidential Proclamation No. 1017 (PP 1017) declaring a state of national emergency:

NOW, THEREFORE, I, Gloria Macapagal-Arroyo, President of the Republic of the Philippines and Commander-in-Chief of the Armed Forces of the Philippines, by virtue of the powers vested upon me by Section 18, Article 7 of the Philippine Constitution which states that: “The President . . . whenever it becomes necessary, . . . may call out [the] armed forces to prevent or suppress . . . rebellion,” . . . and in my capacity as their Commander-in-Chief, do hereby command the Armed Forces of the Philippines, to maintain law and order throughout the Philippines, prevent or suppress all forms of lawless violence as well as any act of insurrection or rebellion and to enforce obedience to all the laws and to all decrees, orders and

⁹ Comm. No. 1815/2008. U.N. Doc. CCPR/C/103/D/1815/2008/Rev.1 (26 April 2012).

¹⁰ G.R. No. 171396, 3 May 2006. This case can be accessed at <http://sc.judiciary.gov.ph/jurisprudence/2006/may2006/G.R.%20No.%20171396.htm>.

¹¹ On 25 February 1986, Filipinos ousted dictator Ferdinand E. Marcos after four days of peaceful demonstrations along the Epifanio de los Santos Avenue (EDSA)—the main highway of Metro Manila. Since numerous ordinary Filipinos flocked along EDSA during those four days, it was called the EDSA 1 People Power Revolution.

regulations promulgated by me personally or upon my direction; and as provided in Section 17, Article 12 of the Constitution do hereby declare a State of National Emergency.

The whereas clauses of PP 1017 enumerates the alleged factual justifications for the proclamation, essentially painting a right-wing and leftist conspiracy to purportedly bring down the Arroyo administration on the occasion of the 20th anniversary of the People Power Revolution:

WHEREAS, over these past months, elements in the political opposition have conspired with authoritarians of the extreme Left represented by the NDF-CPP-NPA and the extreme Right, represented by military adventurists—the historical enemies of the democratic Philippine State—who are now in a tactical alliance and engaged in a concerted and systematic conspiracy, over a broad front, to bring down the duly constituted Government elected in May 2004;

WHEREAS, these conspirators have repeatedly tried to bring down the President;

WHEREAS, the claims of these elements have been recklessly magnified by certain segments of the national media.

In fact, Mrs. Arroyo became unpopular as far as June 2005 due to the “Hello Garci” scandal—a political scandal and electoral crisis in the Philippines involving taped recordings of allegedly wiretapped conversations between her and an election commissioner wherein she asked for a margin of a million votes over her closest rival for the May 2004 presidential election. On 27 June 2005, Mrs. Arroyo went on national television and made her famous “I am sorry” speech, apologizing for her “lapse in judgment” in calling an election officer, but without identifying the officer. After the Hello Garci tapes were publicized, a majority of the Filipinos questioned the legitimacy of Mrs. Arroyo’s presidency. (More about the Hello Garci tapes will be discussed in the next section.)

It was customary to celebrate the EDSA 1 People Power anniversary with a program attended by thousands of people along the Epifanio de los Santos Avenue (EDSA)—the major highway of Metro Manila—and congregate especially at the EDSA Shrine. Hence, PP 1017 was a way to prevent these from happening.

With the issuance of PP 1017, the Office of the President canceled all activities related to the 20th EDSA 1 People Power celebration.¹² It also

¹² The facts hereon will be based on the facts as narrated by the Supreme Court in its decision, which can be accessed at <http://sc.judiciary.gov.ph/jurisprudence/2006/may2006/G.R.%20No.%20171396.htm>.

revoked the permits to hold rallies issued earlier by the local governments. Justice Secretary Raul Gonzales stated that political rallies were canceled. Presidential Chief of Staff Michael Defensor announced that “warrantless arrests and take-over of facilities, including media, can already be implemented.”

Despite PP 1017 and the announcements of government officials, progressive organizations went on and marched from various parts of Metro Manila with the intention of converging at the EDSA shrine. Those already near the EDSA site were violently dispersed by huge groups of anti-riot police. Protesters marching forward to Cubao, Quezon City, and to the corner of Santolan Street and EDSA were also dispersed. The police used PP 1017 as the ground for the dispersal of assemblies.

Randolf David, a well-respected professor at the University of the Philippines and a newspaper columnist, was arrested without a warrant, together with his companion, Ronald Llamas, president of the party-list organization Akbayan, during the dispersal of demonstrators along EDSA.

Also, in the early morning of 25 February 2006, police raided the Manila office of the *Daily Tribune*—a national newspaper, and confiscated news stories by reporters, documents, pictures, and mock-ups of the Saturday issue. Policemen were also stationed inside the editorial and business offices of the newspaper, as well as outside the building. The police also surrounded the premises of another pro-opposition paper, *Malaya*, and its sister publication, the tabloid *Abante*, just a few minutes after the search and seizure at the *Daily Tribune* offices.

In the morning of 27 February 2006, Randolph David, Ronald Llamas, with seven other persons¹³ filed a petition against, inter alia, Mrs. Arroyo as president and commander-in-chief. It was the first petition to be filed before the Supreme Court assailing PP 1017 on the grounds that: (1) it encroaches on the emergency powers of Congress; (2) it is a subterfuge to avoid the constitutional requirements for the imposition of martial law; and (3) it violates the constitutional guarantees of freedom of the press, of speech and of assembly. A total of seven petitions were filed against PP 1017.

On 3 March 2006, Mrs. Arroyo lifted PP 1017 a week after it was issued. But on 7 March 2006, oral arguments still went on before the Supreme Court.

On 3 May 2006, the Supreme Court issued its *En Banc* decision despite the lifting of PP 1017. On the threshold issue of whether the seven petitions have been rendered moot by the lifting of the state of national emergency, the Supreme Court held in the negative due to the petitioners’ allegation of unconstitutional acts by state agents and the void nature of unconstitutional acts:

¹³ Lorenzo Tañada III, H. Harry L. Roque, Jr., Joel Ruiz Butuyan, Roger R. Rayel, Gary S. Mallari, Romel Regalado Bagares, and Christopher F. C. Bolastig.

The Court holds that President Arroyo's issuance of PP 1021 did not render the present petitions moot and academic. During the eight (8) days that PP 1017 was operative, the police officers, according to petitioners, committed illegal acts in implementing it. *Are PP 1017 and G.O. No. 5 constitutional or valid? Do they justify these alleged illegal acts?* These are the vital issues that must be resolved in the present petitions. It must be stressed that "*an unconstitutional act is not a law, it confers no rights, it imposes no duties, it affords no protection; it is in legal contemplation, inoperative.*"¹⁴ (Emphasis in the original, internal citation omitted)

On the substantive issues, the Supreme Court partly granted the petitions. The decision's dispositive portion states in part:

The warrantless arrest of Randolph S. David and Ronald Llamas; the dispersal and warrantless arrest of the KMU and NAFLU-KMU members during their rallies, in the absence of proof that these petitioners were committing acts constituting lawless violence, invasion or rebellion and violating BP 880; the imposition of standards on media or any form of prior restraint on the press, as well as the warrantless search of the *Tribune* offices and whimsical seizure of its articles for publication and other materials, are declared *UNCONSTITUTIONAL*.

No costs.

*SO ORDERED.*¹⁵ (Emphasis in the original)

Concerning the arrest of Prof. David and Ronald Llamas, the Supreme Court held that it was illegal reasoning that there was no clear and present danger to limit their right:

The ringing truth here is that petitioner David et al. were arrested while they were exercising their right to peaceful assembly. They were not committing any crime, neither was there a showing of a clear and present danger that warranted the limitation of that right. As can be gleaned from circumstances, the charges of *inciting to sedition and violation of BP 880* were mere afterthought.¹⁶ (Emphasis in the original)

¹⁴ G.R. No. 171396, 3 May 2006.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

Concerning the padlocking of the *Daily Tribune*, the Supreme Court held that it was a violation of press freedom and characterized the actions of government authorities as plain censorship:

Not only that, the search violated petitioners' freedom of the press. The best gauge of a free and democratic society rests in the degree of freedom enjoyed by its media. . . .

While admittedly, the *Daily Tribune* was not padlocked and sealed like the "*Metropolitan Mail*" and "*We Forum*" newspapers in the above case, yet it cannot be denied that the

CIDG operatives exceeded their enforcement duties. *The search and seizure of materials for publication, the stationing of policemen in the vicinity of the The Daily Tribune offices, and the arrogant warning of government officials to media, are plain censorship.* It is that officious functionary of the repressive government who tells the citizen that he may speak only if allowed to do so, and no more and no less than what he is permitted to say on pain of punishment should he be so rash as to disobey. Undoubtedly, *The Daily Tribune* was subjected to these arbitrary intrusions because of its anti-government sentiments. *This Court cannot tolerate the blatant disregard of a constitutional right even if it involves the most defiant of our citizens. Freedom to comment on public affairs is essential to the vitality of a representative democracy. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.* The motto should always be *obsta principiis*.¹⁷ (Emphasis and underscoring added; internal citations omitted)

Hence, in *David v. Arroyo*,¹⁸ the Philippine Supreme Court protected civil liberty, specifically freedom of speech, of the press, and to peaceful assembly by upholding the exercise of these Constitutional rights despite the President's declaration of a state of national emergency. From the Supreme Court's decision, we can deduce the following principles:

1. A declaration by the president of a state of national emergency does not nullify the people's exercise of constitutional rights such as the right to a free press, speech and to peaceful assembly.

¹⁷ G.R. No. 171396, 3 May 2006.

¹⁸ *Ibid.*

2. The clear and present danger test is still the test to be applied, and it will be applied on a case to case basis.
3. Press freedom is a linchpin right in any democratic society, it is the ultimate test of how free a society is.
4. The most defiant of citizens are still entitled to their constitutional rights, which cannot be blatantly disregarded by the state and its agents.
5. The courts have the duty to protect any encroachment on the constitutional rights of the people.

III. *Francisco Chavez v. Raul M. Gonzales* (15 February 2008)

Can the right to free speech be stifled on the ground that it is violating a penal statute unrelated to speech? This was the novel legal issue addressed by the Philippine Supreme Court in *Chavez v. Gonzales*.¹⁹

On the first week of June 2005, the Hello Garci tapes became known to the Philippine public. It was so called because these were alleged wiretapped phone conversations between then President Gloria Macapagal-Arroyo and then Commission on Elections Commissioner Virgilio Garcillano to manipulate the May 2004 presidential election results. Specifically, on 6 June 2005, then Press Secretary Ignacio Bunye played two CDs of the conversation to reporters, but claiming that these were doctored.²⁰ Four days later, former National Bureau of Investigation Deputy Director Samuel Ong presented what he claimed as “the mother of all tapes” that can implicate Mrs. Arroyo.²¹

The most devastating portion of the Hello Garci tapes was when what appears to be the voice of Mrs. Arroyo asked Commissioner Garcillano, “Hello Garci? So, will I still lead by more than 1 million?”

The Arroyo administration’s main legal arsenal against the Hello Garci tapes was a speech-neutral penal statute: the Anti-Wiretapping Act (AWA) or Republic Act No. 4200, the full title of which is “An Act to Prohibit and Penalize Wire Tapping and Other Related Violations of the Privacy of Communication, and for Other Purposes.” Section 1 of the Act states:

It shall also be unlawful for any person, be he a participant or not in the act or acts penalized in the next preceding sentence, to knowingly possess any tape record, wire record, disc record, or any other

¹⁹ G.R. No. 168338, 15 February 2008. This case can be accessed at <http://sc.judiciary.gov.ph/jurisprudence/2008/feb2008/168338.htm>.

²⁰ Philippine Daily Inquirer, “What Went Before: ‘I am sorry,’” *Inquirer.net*, 30 November 2011, <http://newsinfo.inquirer.net/102821/what-went-before-i-am-sorry>.

²¹ *Ibid.*

such record, or copies thereof, of any communication or spoken word secured either before or after the effective date of this Act in the manner prohibited by this law; or to *replay the same for any other person or persons; or to communicate the contents thereof, either verbally or in writing, or to furnish transcriptions thereof, whether complete or partial, to any other person*: Provided, That the use of such record or any copies thereof as evidence in any civil, criminal investigation or trial of offenses mentioned in Section 3 hereof, shall not be covered by this prohibition.²² (Emphasis added)

It is clear from the full title of the AWA that it was enacted to protect the privacy of communication of a person, or the right to privacy. The Arroyo administration resorted to the AWA to suppress the broadcasting of the Hello Garci tapes. Then Justice Secretary Raul Gonzales exemplified this when he warned reporters on 8 June 2005 that those who had copies of the Hello Garci tapes, and those broadcasting or publishing its contents, could be held liable under the AWA.²³ He further warned that those persons possessing or airing the said tapes were committing a continuing offense, subject to citizens' arrest. The National Telecommunications Commission (NTC) subsequently issued a press release on 11 June 2005, of the same tenor, wherein it warned radio and television operators to observe the AWA.

Due to these warnings, a petition for certiorari and prohibition was filed before the Supreme Court by lawyer Francisco Chavez against Justice Sec. Gonzales and the NTC alleging, inter alia, that the acts of the respondents were violations of the freedom of expression and of the press.

The crucial legal issue in *Chavez v. Gonzales* was whether the alleged violation of a penal statute unrelated to free speech/free press, such as the AWA, will justify the prior restraint on media. The Supreme Court answered in the negative holding that:

We rule that *not every violation of a law will justify straitjacketing the exercise of freedom of speech and of the press. . . .* By all means, violations of law should be vigorously prosecuted by the State for they breed their own evil consequence. But to repeat, *the need to prevent their violation cannot per se trump the exercise of free speech and free press, a preferred right whose breach can lead to greater evils.*²⁴ (Emphasis in the original)

²² Rep. Act No. 4200 (1965).

²³ G.R. No. 168338, 15 February 2008.

²⁴ Ibid.

The greatest import of *Chavez v. Gonzales* is that it presents a doctrine we denote as the “decoupling principle.” From the Supreme Court’s above-quoted holding, we can actually formulate the “Decoupling Principle” as:

The possible violation of a penal statute is no cause for a prior restraint on the freedom of speech and of the press, absent a *Clear and Present Danger*. Therefore, the criminal liability should be decoupled from the exercise of free speech and of the press.

I denote this as the “decoupling” principle since the possible violation of a penal statute is to be separated, or “decoupled” from the exercise of free speech and of the press. Decoupling is a powerful free speech analytic tool with respect to free speech neutral penal statutes. The primary importance of *Chavez v. Gonzales* as a free speech/free press case is that it provides a guideline to the kind of penal statute the violation of which will call for decoupling:

Our laws are of different kinds and doubtless, some of them provide norms of conduct which even if violated have only an adverse effect on a person’s private comfort but does not endanger national security. There are laws of great significance but their violation, *by itself and without more*, cannot support suppression of free speech and free press. In fine, *violation of law is just a factor*, a vital one to be sure, which should be weighed in adjudging whether to restrain the freedom of speech and of the press. The *totality of the injurious effects* of the violation to private and public interest must be calibrated in light of the preferred status accorded by the Constitution and by related international covenants protecting freedom of speech and of the press. In calling for a careful and calibrated measurement of the circumference of all these factors to determine compliance with the clear and present danger test, *the Court should not be misinterpreted as devaluing violations of law*.²⁵ (Emphasis in the original)

From the Supreme Court’s decision, we can infer that decoupling should apply if the exercise of free speech or of the free press only violates a penal statute, the violation of which “have only an adverse effect on a *person’s private comfort but does not endanger national security*.” But if the penal statute allegedly violated by the exercise of free speech and of the press endangers national security, then decoupling does not apply and hence, the exercise of free speech or of the press is subject to prior restraint. The import of the Supreme Court’s pronouncement is that it gives a criterion for the applica-

²⁵ Ibid.

bility of decoupling. As applied to the specific facts of the case, the Supreme Court held in *Chavez v. Garcia* that:

For this failure of the respondents alone to offer proof to satisfy the clear and present danger test, the Court has no option but to uphold the exercise of free speech and free press. There is no showing that the feared violation of the anti-wiretapping law clearly endangers the *national security of the State*.²⁶ (Emphasis in the original)

Moreover, the peculiar fact in *Chavez v. Gonzales* is that the assailed acts of the Respondents, Justice Sec. Gonzales and the NTC, were *mere press statements, and not written issuances*. *Chavez v. Gonzales* strengthened the protection afforded to free speech and free press when it held that even *mere press statements* by executive officials can already constitute a form of content-based prior restraint. That the respondents' assailed acts were *mere press statements* did not deter the Supreme Court from holding in *Chavez v. Gonzales* that such acts constituted content-based prior restraint:

In resolving this issue, we hold that *it is not decisive that the press statements made by respondents were not reduced in or followed up with formal orders or circulars. It is sufficient that the press statements were made by respondents while in the exercise of their official functions*. Undoubtedly, respondent Gonzales made his statements as Secretary of Justice, while the NTC issued its statement as the regulatory body of media.²⁷ (Emphasis in the original; underscoring added)

The Supreme Court further provided a criterion to determine whether the act of an executive official is tantamount to prior restraint: "*Any act done, such as a speech uttered, for and on behalf of the government in an official capacity is covered by the rule on prior restraint*"²⁸ (emphasis in the original).

IV. UN Human Rights Committee: *Alexander Adonis v. The Philippines* (26 October 2011)

The Philippines is a state party both to the International Covenant on Civil and Political Rights (ICCPR), and to its Optional Protocol 1. As such, the Philippines recognizes the competence of the Human Rights Committee

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

(HRC) “to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.”²⁹

Hence, on 3 July 2008, radio broadcaster Alexander Adonis submitted a communication to the HRC against the Philippines.³⁰ Adonis claimed to be a victim of violations by the Philippines of, *inter alia*, Article 19, paras. 2 and 3 of the ICCPR.

Adonis was a radio broadcaster of Bombo Radyo, a radio station especially popular in the southern Philippines. On 27 July 2001, Adonis got a news report from the Bombo Radio News Centre about a congressman’s alleged “illicit” relation with a married television personality.³¹ Adonis tried to contact the persons involved for confirmation, but to no avail. On the same day at 7 a.m., Adonis did his regular radio news program, with the station manager, and reported about the congressman’s “affair” without disclosing the names. The same congressman’s “affair” was the subject of a debate during Adonis’s 11:30 a.m. radio program.

On 23 October 2001, the congressman filed a criminal complaint for libel against Adonis for the 7 a.m. news report and another complaint for the 11 a.m. program. Both complaints were based on Article 353 of the Revised Penal Code of the Philippines on libel.³²

On 26 January 2007, the Regional Trial Court of Davao City acquitted Adonis on the first libel complaint, but convicted him for the second complaint. He was sentenced to an indefinite penalty ranging from 5 months and 1 day to 4 years, 6 months and 1 day of imprisonment, aside from payment of 100,000 Philippine pesos. The Court reasoned that the invocation of the truth by Adonis “did not constitute a valid defence” and that, in any case, “no proof of any such truth of the imputation had been presented.”

²⁹ See Optional Protocol to the ICCPR, Article 1.

³⁰ Alexander Adonis was represented in this Communication by Prof. H. Harry L. Roque, Jr., president of Media Defence Southeast Asia (MDSEA) and chairperson of the Center for International Law Philippines, Inc. (CenterLaw). This Communication was filed as part of the legal advocacy of CenterLaw and MDSEA.

³¹ The facts hereon will be based on the facts as narrated by the HRC in its view of *Adonis v. The Philippines*, which can also be downloaded at http://search.ohchr.org/search?as_sitesearch=www2.ohchr.org/english/bodies/hrc&site=default_collection&client=default_frontend&output=xml_no_dtd&ie=UTF-8&oe=UTF-8&Entqr=0&ud=1&sort=date%3AD%3AL%3Ad1&proxystylesheet=en_frontend&q=Adonis+vs.+The+Philippines&ip=202.156.8.249&access=p&entqr=0.

³² Art. 353. Definition of libel: A libel is public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance tending to cause the dishonor, discredit, or contempt of a natural or juridical person, or to blacken the memory of one who is dead.

After serving about a year and a half in prison, Adonis filed a communication before the HRC. The key legal argument of Adonis is the unreasonableness of Philippine libel law since truth is not a complete defense:

3.3 The author further contends that Philippine libel law is not a reasonable restriction because it does not permit proof of truth as a complete defence but only allows it under very restricted conditions. Under Article 361 of the Revised Penal Code, proof of truth shall only be admitted where the imputation against Government officials relates to the discharge of their official duties. Therefore, he was prevented from invoking truth as a defence in his case. The author cites international jurisprudence and soft law confirming that proof of truth of allegedly defamatory statements should fully absolve defendants of any liability.³³ (Internal citation omitted)

On 26 October 2011, the HRC adopted its landmark view against the Philippines which, *inter alia*, for precision is quoted below:

7.10 In light of the above, the Committee considers that, in the present case the sanction of imprisonment imposed on the author was incompatible with Article 19, paragraph 3, of the Covenant.³⁴

The major rationale behind the HRC's view is that the libel provision of the Philippines does not conform with the standards set in Article 19, para. 3 of the ICCPR, as argued by Adonis:

7.7 The Committee takes note of the author's allegation that his conviction for defamation under the Philippine Penal Code constitutes an illegitimate restriction of his right to freedom of expression because it does not conform to the standards set by article 19, paragraph 3, of the Covenant. The author maintains, in particular, that the criminal sanction of imprisonment established by the Philippine Revised Penal Code for libel is neither necessary nor reasonable, because of the following reasons: (a) there are less severe sanctions available; (b) it admits no proof of truth as a defence except for very limited cases; (c) it does not take into account the public interest as a defence; or (d) it presumes malice in the alleg-

³³ Comm. No. 1815/2008. U.N. Doc. CCPR/C/103/D/1815/2008/Rev.1, §3.3 (26 April 2012). *Supra* note 31.

³⁴ Comm. No. 1815/2008. U.N. Doc. CCPR/C/103/D/1815/2008/Rev.1, §7.10 (26 April 2012).

edly defamatory statements placing the burden of proof on the accused.³⁵

In particular, the HRC arrived at its view by referring to its General Comment No. 34, specifically on truth as a defence in libel accusations:

7.8 Article 19, paragraph 3, lays down specific conditions and it is only subject to these conditions that restrictions may be imposed, i.e. the restrictions must be provided by law; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality. (Internal citation omitted)

7.9 The Committee recalls its general comment No. 34 according to which “defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expressions that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognized as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties. . . . States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.”³⁶ (Internal citation omitted)

Hence, it can be safely deduced that the HRC’s view on Adonis’ conviction, was based on the peculiar fact that truth is not a defence in Philippine libel law, except for very limited cases. Further, the HRC recommended that the Philippines review its libel legislation:

³⁵ Comm. No. 1815/2008. U.N. Doc. CCPR/C/103/D/1815/2008/Rev.1, §7.7 (26 April 2012).

³⁶ Comm. No. 1815/2008. U.N. Doc. CCPR/C/103/D/1815/2008/Rev.1, §7.8-§7.9 (26 April 2012).

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the State party is under an obligation to provide the author with an effective remedy, including adequate compensation for the time served in prison. The State party is also under an obligation to take steps to prevent similar violations occurring in the future, including by reviewing the relevant libel legislation.³⁷

The HRC provided a 180-day period within which the Philippines should provide information on its compliance with the recommendations:

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the Committee's Views.³⁸

The irony of it all is that the Philippines has not complied with any of the recommendations of the HRC in *Adonis v. The Philippines*, such as a review of its relevant libel legislation. Worse, the Philippine even included a cyber-libel provision in its Cybercrime Prevention Act of 2012, and imposed a longer prison sentence for it compared to traditional libel. This naturally is the next topic.

V. Round 2: Invoking *Adonis v. The Philippines* in Assailing the Cyber-Libel Provision in the Philippine Cybercrime Prevention Act of 2012 and the Traditional Libel Provisions in the Revised Penal Code

Despite the HRC view on *Adonis v. The Philippines*, the Philippine House of Representatives and the Senate, respectively passed Republic Act No. 10175, otherwise known as the Cybercrime Prevention Act of 2012 (hereafter,

³⁷ Comm. No. 1815/2008. U.N. Doc. CCPR/C/103/D/1815/2008/Rev.1, §9 (26 April 2012).

³⁸ Comm. No. 1815/2008. U.N. Doc. CCPR/C/103/D/1815/2008/Rev.1, §10 (26 April 2012).

“CPA”). On 12 September 2012, President Benigno Simeon Aquino III signed the CPA into law.

Widespread protests from Filipino “netizens” greeted the CPA. On 28 September 2012, Alexander Adonis and five other petitioners³⁹ filed before the Philippine Supreme Court a “Petition for Certiorari and Prohibition, with Prayer for the Issuance of a Writ of Prohibitory Injunction and/or Temporary Restraining Order,” assailing, inter alia, the constitutionality of Section 4(c)(4) of the CPA, which penalizes the cyberspace version of libel:

SEC. 4. *Cybercrime Offenses.* The following acts constitute the offense of cybercrime punishable under this Act:

(c) Content-related Offenses: . . .

4) Libel. The unlawful or prohibited acts of libel as defined in Article 355 of the Revised Penal Code, as amended, committed through a computer system or any other similar means which may be devised in the future.

For transparency sake, this author was one of Adonis’s copetitioners and also a cocounsel. A total of 15 petitions were filed by different groups against the CPA before the Supreme Court. On 9 October 2012, the Supreme Court issued a temporary restraining order against the implementation of the CPA for the next 120 days.

On 27 December 2012, we filed an amended petition additionally assailing the constitutionality of Article 355 of the Philippine Revised Penal Code (RPC),⁴⁰ which refers to traditional libel by writings or similar means:

Art. 355. *Libel means by writings or similar means.* A libel committed by means of writing, printing, lithography, engraving, radio, phonograph, painting, theatrical exhibition, cinematographic exhibition, or any similar means, shall be punished by *prision correccional* in its minimum and medium periods or a fine ranging from 200 to 6,000 pesos, or both, in addition to the civil action which may be brought by the offended party.

On 15 and 29 January 2013, oral arguments were held before the Supreme Court. Prof. Harry L. Roque, Jr., Adonis’s copetitioner as well as lead counsel,

³⁹ Ellen Tordesillas, Ma. Gisela Ordenes-Cascolan, H. Harry L. Roque, Jr., Romel R. Bagares, and this author On 27 December 2012, Adonis et al. filed an amended petition, inter alia, adding petitioner Vera Files represented by Ms. Ellen Tordesillas.

⁴⁰ The amended petition can be accessed at <http://www.ellentordesillas.com/wp-content/uploads/2013/01/Amended-Petition.pdf>.

was designated to argue “the most objected provision of the law,”⁴¹ referring to Section 4(c)(4) on cyber-libel. He was also additionally tasked to argue on the constitutionality of the cybersex provision of the CPA.⁴² At some point during the interpellation by Supreme Court Chief Justice Maria Lourdes Sereno of Prof. Roque, the latter delivered an impassioned reply for free speech (quoting the unofficial transcripts of the oral arguments):

CJ Sereno: But I am also concerned about those who commit suicide. Those who cannot wait for the deleting of posts, . . . who in their state have already taken steps to inflict harm upon themselves. This has happened not only to young people but even to more mature people. Does the state not have a right to regulate the invasion of lives of these people? [Is not the] chilling effect [of legislation created] in order that individuals may exercise a little restraint? Is this not the intended consequence of making libel as expressly punishable in cyber space?

Roque, Jr.: Your honor, with all due respect, I take a different position. . . . The Constitution provides that the exercise of police power should be in a manner that would not infringe on guaranteed freedoms. We are arguing here that the exercise of police power through the enactment of the cybercrimes prevention law infringes on that freedom because it may affect the exercise of the constitutionally protected speech. It may result in a chilling effect on the exercise of the right as fundamental as freedom of expression. . . .

We may be wrong in our constitutional commitment to freedom of expression, your honor. It may not be the best means to arrive at the truth. It may not be the best means to control government. But unless we change our constitutional commitment to freedom of expression, we need to continue to protect it vigilantly. I commiserate with those who have committed suicide. I commiserate with all those who have been harmed as in fact I have been harmed gravely many times on the Internet. But ultimately *US v. Bustos* says that the wound for hurt feelings is the balm of a clear conscience. We need to do a very delicate balancing of interest your honor. What is at stake is the freedom, which has enabled our democracy to exist. This Court has said that freedom of expression is the foundation of all other rights. That is why we need to be ever vigilant and this vigilance in fact is reflected in the very high test that this statutes have to pass under the strict scrutiny test; that is, that those statutes that infringe on protected freedoms are heavily presumed to be unconstitutional.

⁴¹ <http://harryroque.com/2013/01/page/2/>.

⁴² *Ibid.*

CJ Sereno: Is it not a legitimate state interest to find the balance between allowing freedom of expression and protecting that area of privacy that our libel laws are intended in fact to protect. Are you not even willing to concede that we have to find that balance as a court, as a task before this court?

Roque, Jr.: Well in the view of the UN Human Rights Committee, the balance is reached by using the alternative, which is civil libel and not incarceration.⁴³

On 30 January 2013, we filed a Second Amended Petition, *additionally* assailing the constitutionality of the other traditional libel provisions of the RPC.⁴⁴ These libel provisions are Articles 353,⁴⁵ 354, 361, and 362 of the RPC, which provide:

Art. 354. *Requirement for publicity*. Every defamatory imputation is presumed to be malicious, even if it be true, if no good intention and justifiable motive for making it is shown, except in the following cases:

1. A private communication made by any person to another in the performance of any legal, moral or social duty; and
2. A fair and true report, made in good faith, without any comments or remarks, of any judicial, legislative or other official proceedings which are not of confidential nature, or of any statement, report or speech delivered in said proceedings, or of any other act performed by public officers in the exercise of their functions.

Art. 361. *Proof of the truth*. In every criminal prosecution for libel, the truth may be given in evidence to the court and if it appears that the matter charged as libelous is true, and, moreover, that it was published with good motives and for justifiable ends, the defendants shall be acquitted.

Proof of the truth of an imputation of an act or omission not constituting a crime shall not be admitted, unless the imputation shall have been made against Government employees with respect to facts related to the discharge of their official duties.

In such cases if the defendant proves the truth of the imputation made by him, he shall be acquitted.

⁴³ <http://harryroque.com/2013/01/>.

⁴⁴ The *second* amended petition can be accessed at <http://harryroque.files.wordpress.com/2013/01/2nd-amended-petition-cybercrime-law.pdf>.

⁴⁵ Supra note 32.

Art. 362. *Libelous remarks.* Libelous remarks or comments connected with the matter privileged under the provisions of Article 354, if made with malice, shall not exempt the author thereof nor the editor or managing editor of a newspaper from criminal liability.

On 5 February 2013, the Supreme Court extended indefinitely the temporary restraining order against the CPA.

Adonis et al.'s peculiar legal argument against the cyber-libel provision in the CPA was the invocation of the HRC view in *Adonis v. The Philippines*. We saw the unique opportunity to invoke the HRC view—a treaty body, before the Philippine Supreme Court. This seemed like the completion of a domestic court–international body circle, peculiar at least to the Philippine's somewhat monist view of international law.

In order to invoke the HRC view in *Adonis v. The Philippines*, we first had to justify the legal weight that such HRC view had in the Philippine domestic legal sphere. Hence, we argued that the HRC is a treaty monitoring body created under an optional protocol to the ICCPR with the power to declare that a state party to the Convention is in breach of its obligations under the ICCPR.⁴⁶ As a state party to the ICCPR, the Philippines is bound to fulfill its obligations under this treaty.⁴⁷ It is also fundamental that all treaties are binding on the state party ratifying the same and must be performed by them in good faith.⁴⁸ Also, under the Philippine Constitution, treaties become part of the law of the land through transformation pursuant to the Constitution provision that “no treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate.”⁴⁹

The ICCPR and the Optional Protocol are such treaties.⁵⁰ Therefore, the ICCPR duties and obligations of the Philippines are state obligations that form part of the “law of the land.”⁵¹ Hence, by the force of the Philippine Constitution, the Philippines therefore has the obligation to carry out its

⁴⁶ See the Adonis et al. original petition which can be accessed at <http://webcache.googleusercontent.com/search?q=cache:H2KXLpkU77YJ:www.ellentordesillas.com/wp-content/uploads/2012/10/Cybercrime-petition.doc+&cd=4&hl=en&ct=clnk&gl=sg>.

⁴⁷ Ibid.

⁴⁸ Article 26, Vienna Convention on the Law of Treaties. See the Adonis et al. original petition, *supra* note 46.

⁴⁹ Article VII, Section 21, of the 1987 Constitution: “No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.”

⁵⁰ See the Adonis et al. original petition, *supra* note 46.

⁵¹ Ibid.

ICCPR obligations as interpreted and viewed by the HRC, itself an organ created under the ICCPR.⁵²

We then invoked the HRC view in *Adonis v. The Philippines* directly against the traditional libel provision of the RPC. We argued that in accordance with the HRC view in *Adonis v. The Philippines*, the RPC's provisions penalizing libel with imprisonment is "incompatible with article 19, paragraph 3, of the Covenant."⁵³ This argument is in reference to Paragraph 7.10 of the HRC quoted earlier.

We further invoked the HRC view by arguing that the penalty of imprisonment for libel under Article 355 of the RPC directly contradicts para. 7.9 of the HRC view wherein quoting its General Comment No. 34 the HRC states, inter alia, that for defamation "imprisonment is never an appropriate penalty."⁵⁴

Lastly, we invoked the HRC view by arguing that Articles 354, 361, and 362 of the RPC contradict Paragraph 7.9 of the HRC view wherein quoting its General Comment No. 34 the HRC states, inter alia, that "penal defamation laws, should include such defences as the defence of truth."⁵⁵ For Article 354 of the RPC, truth is not a defense to a libel charge.⁵⁶ For Article 361 of the RPC, though truth is stated as a defense, it, however, adds the qualifications that the matter charged must be published with good motives and for justifiable ends.⁵⁷ For Article 362 of the RPC, a mere showing of "malice" shall already result in criminal liability even for a privileged matter under Article 354.⁵⁸

Regrettably, in its 18 February 2014 decision, the Philippine Supreme Court upheld the constitutionality of the cyber-libel provision in Section 4(c)(4) of the CPA, as well as the traditional libel provisions in the RPC. Subsequently, the Philippine Supreme Court denied all the Motions for Reconsideration filed against its 18 February 2014 decision.

Hence, we shall file another communication before the UNHRC to argue that with the 18 February 2014 decision of the Philippine Supreme Court, the Philippines violated its state obligations under the ICCPR, as expounded by the UNHRC in *Adonis v. The Philippines*.

⁵² Article 28 of the ICCPR. See also the Adonis et al. original petition, *supra* note 46.

⁵³ See the Adonis et al. original petition, *supra* 46.

⁵⁴ See the Adonis et al. Memorandum, which can be accessed at <http://harryroque.com/2013/02/20/text-of-our-memorandum-against-the-cybercrimes-prevention-act/>.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

VI. Conclusion

We hope that despite the atmosphere of impunity against journalists in the Philippines, other countries can still learn from Philippine free speech jurisprudence, see these as a legal resource, and even cite these in their own jurisprudence.

Nevertheless, if the Philippines intends to be the beacon of free speech in Asia, then the government has to fulfill its obligation under international law to promptly investigate and prosecute the embarrassing incidents of extrajudicial killings of Filipino journalists. It is ironic that the extrajudicial killing of Filipino journalists has been resorted to by some people as a cost-effective way of suppressing free speech. Unless and until the Philippine government vigorously and effectively prosecutes the perpetrators of extrajudicial killings of Filipino journalists, the Philippines' liberal-democratic free speech and free press legal structure will just be mere legal formalisms. Hence, it is in this context that there is an imperative need for the vigorous prosecution of the killers of these journalists. In any case, the right to freedom of expression will be illusory until we first protect the right to life of Filipino journalists.

The Fragile Complexity of Protecting Freedom of Speech in Australia

RHONDA BREIT

I. The Fragility of Freedom of Speech in Australia

Twenty years on from the landmark decisions recognizing a *right* to freedom of political communication implied in the Commonwealth of Australia Constitution, Australians contemplating the legal status of freedom of speech might be excused for asking: Where the bloody hell are we?

The optimism emerging from the free speech cases of the early 1990s suggesting Australia was moving toward a human rights–based style of judicial review¹ has given way to skepticism and concern about the fragility of freedom of expression in Australia.² Despite the introduction of the Australian Human Rights Framework to protect and promote human rights, consecutive governments have sought to introduce policy reforms that ultimately chill traditional opportunities to express opinions³ or air dissenting

¹ *Nationwide News Pty. Ltd. v. Wills* (1992); *Australian Capital Television Pty. Ltd. v. Commonwealth* (1992) 177 CLR 1 and 106, respectively; *Theophanous v. Herald and Weekly Times* (1994) 182 CLR 104; *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520.

² See M. Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Aldershot: Ashgate, 2000); J. Trigg, “Freedom of Speech Is Not in Danger in Australia,” 25 February 2003, <http://www.humanrights.gov.au/news/opinions/freedom-speech-not-danger-australia-2013>; A. Stone, “Insult and Emotion, Calumny and Invective: Twenty Years of Freedom of Political Communication,” *University of Queensland Law Journal* 30.1 (2011): 79–97.

³ See Peter Bartlett, “Freedom of Expression Is a Fragile Thing in Australia,” *The Advertiser*, 25 February 2013.

views.⁴ As the following discussion reveals, the 20 years since the free speech cases of the 1990s is not a simple story of shrinking opportunities for people to express opinions. It is a complex tale of retreating and advancing prospects for speech freedoms and rights in an increasingly thorny legal environment that is progressively dependent on the courts to interpret the “value” attributed to speech. “Identifying and weighing the elements of freedom of speech protection in any area of Australian law is thus a complex process,” claims Professor Michael Chesterman,⁵ who describes freedom of speech in Australian law as a “delicate plant.”

By examining the legal status of freedom of speech in Australia this chapter highlights the fragile complexity of freedom of speech jurisprudence. It reveals a vast discretionary power vested in the judiciary to determine the scope and quality of freedom of speech in Australia, particularly in terms of the level of civility required in public discourse.

II. Problematizing Free Speech Protection in Australia

“Australia is one of the freest countries in the world,” according to Human Rights Commission President Jillian Trigg. But she cautions constant vigilance is needed in a country which relies on the common law and a constitutional principle known as “the implied freedom of political communication” to protect free speech at a national level.⁶ Trigg’s concern about the fragility of free speech arises from the difficulties associated with ascertaining *the limits of such freedom* where the right of some to speak their mind vilifies and disparages others: “Australians do not fear that their right to freedom of speech or political opinion is at risk. Rather they are justly concerned that they and their families will be racially abused in a public place.”⁷

These remarks came in the wake of the 2013 visit by controversial right-wing Dutch politician Geert Wilders. He was in Australia promoting his party’s views that Islamic ideology is violent and incompatible with Western values and freedoms. For some, the controversial visit was seen as a triumph for multicultural Australia:

The Wilders visit has presented ... an occasion for us to reaffirm the success of multicultural Australia. Somewhat ironically, the past week has been a good demonstration of how Muslim communities

⁴ See D. Celemajer, “The State of Free Speech,” *Australian Journal of Political Science* 42.3 (2008): 495–511; Bartlett, “Freedom of Expression Is a Fragile Thing in Australia.”

⁵ Chesterman, *Freedom of Speech in Australian Law*, 13.

⁶ Trigg, “Freedom of Speech Is Not in Danger in Australia.”

⁷ Ibid.

in this country have exercised that liberal virtue of tolerating the intolerable.⁸

Wilders's recent visit contrasts sharply with the experiences of contentious historian David Irving in 1993, when the holocaust denier was refused entry into Australia. Given the contrasting experiences of such controversial figures, a question arises as to whether the constitutional principle described as the "implied freedom of political communication" has led to a freer "market of speech" in Australia? The answer to this question rests on understanding the limits of freedom of speech in Australia, which is understood best through an investigation into how speech protection sits in relation to other important interests.

III. The Legal Status of Freedom of Speech in Australia: A Complex Tapestry

The Commonwealth of Australia has no explicit or comprehensive guarantee of freedom of speech. According to philosophical theory, freedom of speech receives protection in its own right "when and only when the relevant rules allow greater leeway for conduct which falls within the category of speech."⁹ Identifying the "relevant rules" that allow speech "greater leeway" in Australia involves more than looking for constitutional principles.

Speech protection in Australia emerges through a complicated patchwork of legislative, common law and constitutional principles that have the practical effect of requiring the judiciary and politicians to make judgments about the worth of speech relative to other rights and freedoms. Numerous factors can influence the valorization of freedom of speech, including international, foreign and local developments in human rights and free speech jurisprudence. As a signatory to the International Covenant on Civil and Political Rights, Article 19 commits Australia to guaranteeing all residents have a "right to freedom of expression," subject to express limitations contained in Article 19(2). The ICCPR does not invest Australians with an enforceable right to freedom of expression. Rather, it encourages "judges to develop the common law in Australia in conformity with Article 19 and the other provisions of the Covenant."¹⁰

Therefore, there are global and local aspects to Australia's free speech protection affected particularly by Australia's commitment to international

⁸ Tim Soutphommasane, "After the Wilders Trip, Multicultural Australia Can Take a Bow," *The Age*, 25 February 2013.

⁹ Chesterman, *Freedom of Speech in Australian Law*, 2.

¹⁰ *Ibid.*, 3.

covenants and conventions, the recently enacted National Human Rights Framework, state and territory legislation protecting human rights, freedom of information laws, the common law and the constitutional principle of an “implied freedom of political communication.”

A. A New Framework for Legislators

In 2011, Australia’s Human Rights Framework was introduced further embedding the principles enunciated in the ICCPR¹¹ and affording greater prominence and protection for all human rights, including freedom of speech.

Under this framework, the Commonwealth government launched a National Human Rights Action Plan¹² aimed at promoting human rights education and understanding. Developed in consultation with the community, the Action Plan prioritized human rights issues Australians expect governments to act on, namely, improving access to justice; properly balancing the need for security with individual liberty, particularly in Australia’s counter-terrorism arrangements; combating people trafficking; addressing climate change; ensuring decent working conditions; and assisting the disadvantaged.¹³ Freedom of speech was not explicitly prioritized, but its importance is implicit across all priority areas.

The Framework affords human rights protection through the introduction of the Human Rights (Parliamentary Scrutiny) Act (Cth) 2011 requiring Statements of Compatibility to accompany all new bills being introduced into the Commonwealth Parliament.¹⁴ This statement should include explanations and justifications for any legislative incursions on human rights. Guidelines have been developed to help legislators’ assess the human rights compatibility of bills and legislative instruments, recommending an eight-question framework to explain the relationship new legislation bears to human rights. Starting with the question, “What is the objective of the proposed bill or legislative instrument?” legislators are asked to describe the policy problem the new legislation addresses. They are then prompted to ask a series of questions to determine the rights compatibility of legislation. Limitations on human rights must be *reasonable, necessary and proportionate*. Such restrictions must go only as far as necessary to achieve a *legitimate aim* and should be sufficiently precise, addressing only the matters it intended to capture. Finally,

¹¹ And other Human Rights instruments.

¹² Attorney-General’s Department, National Human Rights Action Plan (2012), viewed at <http://www.ag.gov.au>.

¹³ *Ibid.*, 13.

¹⁴ See Section 8(3).

legislators are asked to consider whether other, less restrictive, options might give effect to the objective.¹⁵

Clearly this process of identifying the reasonable proportionality of incursions on Human Rights involves identifying and attributing value to rights. Here again, the Framework provides resources to assist legislators, offering links to seven human rights treaties as well as information sheets on absolute rights, permissible limitations and guidelines for interpreting specific rights.

Scholars disagree on what freedom of speech means, why its protection is desirable and how it should be protected without unduly impairing other rights and freedoms.¹⁶ The National Framework offers some guidelines for interpreting freedom of speech, noting the right to hold opinions is an absolute right, which cannot be subject to any exception or restriction. However, the right to freedom of expression carries special responsibilities. It extends to any medium (including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising) and may be restricted on several grounds:

When working on a measure that restricts freedom of expression, you should ask yourself whether the measure can be justified under the permitted grounds for restriction, whether it will be effective to achieve the desired ends, whether it impinges on freedom of expression to a greater degree than is necessary and whether there are less restrictive means of achieving the desired ends.¹⁷

A new Parliamentary Joint Committee on Human Rights has been established to scrutinize proposed and existing Commonwealth legislation for compatibility with Australia's obligations under major international human rights instruments.¹⁸ The lack of any comprehensive federal human rights legislation means the committee is tasked with establishing meaningful criteria and assessments of legislative compatibility with human rights.

¹⁵ See Attorney General's Department, Flowchart for Assessing the Human Rights Compatibility of Bills and Legislative Instruments (2011), <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Toolforassessinghuman-rightscompatibility.aspx>.

¹⁶ Chesterman, *Freedom of Speech in Australian Law*, 1.

¹⁷ Available at <http://www.ag.gov.au>.

¹⁸ Human Rights (Parliamentary Scrutiny) Act 2011 (Cth); B. Horrigan, "Reforming Rights-Based Scrutiny and Interpretation of Legislation," *Alternative Law Journalism* 37.4 (2012): 228–32, 228.

B. Human Rights Legislation

Human rights-based review of legislation is further entrenched in the Australian Capital Territory and the state of Victoria, where freedom of expression receives express protection through the Human Rights Act 2004 (ACT) and the Charter of Human Rights and Responsibilities 2006 (Vic). Tasmania and Western Australia have engaged in extensive community consultation toward enacting legislation guaranteeing human rights. However, at the time of publication no legislation had been introduced in either of these states. Western Australia deferred enactment of a state-based Human Rights Act pending a national review. The National Review fell short of introducing a Charter of Human Rights, opting instead for the National Human Rights Framework. Therefore, at a federal level, freedom of speech protection arises from the *common law* and the constitutional principle of implied freedom of political communication as articulated by the High Court of Australia in 1992.

C. Freedom of Information

An individual right to access government or political information is derived through the system of freedom of information laws, which apply nationally and in each state and territory in Australia. Every Australian jurisdiction has introduced comprehensive freedom of information laws. Two approaches to access to information currently operate across the country, further complicating the status of freedom of speech. The first approach can be characterized as a “*push*” or *prodisclosure* model, which sees government-held information released administratively as a matter of course (unless its release is counter to public interest). The states of Queensland, Tasmania and New South Wales as well as the Commonwealth/federal governments now require agencies to automatically disclose information rather than wait for requests for its disclosure. This paradigmatic shift in FOI emulates reforms in countries like the US (the Obama Open Government Initiative), the UK (Transparency 2.0) and New Zealand, suggesting a shift from deliberative democracy to, what Noveck¹⁹ describes as, “collaborative” democracy where expert citizens are an integral part of the management of government information resources, helping to covert information and data into something meaningful and useful for the public.

The remaining states and territories have traditional request-driven or pull model FOI schemes, which invest the public with rights to access government-held information, including personal information contained in govern-

¹⁹ B. S. Noveck, *Wiki Government: How Technology Can Make Government Better, Democracy Stronger, and Citizens More Powerful* (Washington, DC: Brookings Institution Press, 2009), 18–20, chap. 7.

ment documents, unless disclosure would be contrary to the public interest. Legislation specifies a right to correct misleading or inaccurate documents and review decisions made by government agencies relating to document disclosure. Agencies are still obliged to publicize information about the operations of departments and public authorities, including the rules and practices affecting members of the public in their dealings with departments and public authorities. This helps generate a more consistent level of reliable public information. Therefore, agencies are encouraged to provide access to information and assist requesters in finding information. By contrast to the push-model regime, the notion of democracy underpinning this system is a deliberative democracy where the legislation is put in place to ensure the free flow of information to electors.

In summary, FOI laws give all Australian residents a right to access government information. Different conceptions of democracy inform the approach to government information management and distinctive regimes operate in tandem, resulting in confusion and frustration for users.²⁰ Notwithstanding the ambiguity arising from the bifurcation of Australia's FOI regimes, the positive right of individual access to government information combines with a suite of negative rights and freedoms entrenched in common law and the Commonwealth Constitution to create a complex tapestry of speech-protection laws.²¹

D. Freedom of Speech Protection at Common Law

The common law of Australia recognizes freedom of speech is a "value" requiring protection but this protection is multileveled and multilayered. Freedom of speech derives protection at common law because it is an essential aspect of the public interest²² and a prerequisite to criticizing public bodies.²³ Moreover, freedom of speech is an essential consideration in the application of many Australia laws (both common laws and statute), including laws relating to defamation, contempt of court, intellectual property, anti-vilifi-

²⁰ Rhonda Breit, Paul Henman, Johan Lidberg, and Rick Snell, "Towards a Qualitative approach to evaluating FOI" presented at IAMCR 2013 Conference, Crisis, Creative Destruction and the Global Power and Communication Order", Dublin City University, Dublin, Ireland, 25-29 June, 2013. Rhonda Breit, Paul Henman, Johan Lidberg and Rick Snell, "Scoping FOI Literacies: A Case Study of Australia". Asian Media Information and Communication Centre, 22nd Interenational Annual Conference, Yogyakarta, Indonesia, 4-7 July 2013.

²¹ Australia has a range of legislation that affects the speech protection, such as anti-vilification laws, which are not discussed in this chapter.

²² See *Bonnard v. Perryman* (1891) 2 Ch 269, 284.

²³ See *Ballina Shire Council v. Ringland* (1994) 33 NSWLR 680.

cation laws, duty of confidence, racial vilification, misleading and deceptive practice; shield laws as well as the rules of legal practice relating to the granting of interlocutory injunctions.²⁴

The fundamental importance of freedom of speech to the exercise of civil and political liberties means it has “independent and intrinsic weight” justifying “an interpretation of both common law and statute which serves to protect it from interference or restriction.”²⁵ Significantly, the common law requires that statute law “be interpreted consistently with the common law where the words of the statute permit.”²⁶ It is now being suggested this presumption gives rise to a general right to freedom of speech because of the rule that “everybody is free to do anything, subject only to the provisions of the law.”²⁷ Obviously, rights and freedoms recognized at common law can be curtailed or extinguished by parliament.²⁸ The judiciary, however, are the ultimate arbiters of the rights-compatibility of legislation where they apply a common law presumption that the right-limiting intention of legislation will be “evidenced clearly by express provision or necessary implication”²⁹: “In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.”³⁰

This presumption forms the basis of the “the constitutional relationship between the arms of government respecting the making, interpretation and application of laws,” providing the methodology via which contemporary Australian courts decide the intention of legislation.³¹ Some have suggested it gives rise to a “set of constitutional rights, even if these are not formally entrenched against legislative repeal”³² or a “common law Bill of Rights.”³³ French CJ explains, however, the “interpretive rule can be regarded

²⁴ See Chesterman, *Freedom of Speech in Australian Law*; Chief Justice R. S. French, “The Constitution and the Protection of Human Rights”, Edith Cowan University Vice-Chancellor’s Oration; 20 November 2009, Perth. <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj20nov09.pdf>.

²⁵ T. R. S. Allan, “The Common Law of the Constitution: Fundamental Rights and First Principles,” in C. Saunders, ed., *Courts of Final Jurisdiction: The Mason Court in Australia* (Annandale, NSW: Federation Press, 1996), 148.

²⁶ French, “The Constitution and the Protection of Human Rights,” 2009, 26.

²⁷ For example, see *Coleman v. Power* (2004) 209 ALR 182, 199, 228, 237-238, 246.

²⁸ French, “The Constitution and the Protection of Human Rights,” 2009, 27.

²⁹ Horrigan, “Reforming Rights-Based Scrutiny and Interpretation of Legislation,” 229.

³⁰ *R. v. Secretary of State for the Home Department; Ex Parte Simms* (2000) 2 AC 115, 131.

³¹ See Horrigan, “Reforming Rights-Based Scrutiny and Interpretation of Legislation,” 229; see also *Plaintiff M4 7-20 12 v. Director General of Security* (2012) HCA 46 (5 October 2012), 118.

³² Allan, “The Common Law of the Constitution,” 148.

³³ Horrigan, “Reforming Rights-Based Scrutiny and Interpretation of Legislation,” 229.

as ‘constitutional’ in character even if the rights and freedoms which it protects are not.”³⁴

This argument was borne out in *Davis v. The Commonwealth*³⁵ where the High Court declared aspects of the Australian Bicentennial Authority Act 1980 (Cth) invalid. The Act vested the Authority with the exclusive right to use or license the use of any combination of words relating to the bicentennial celebrations, including the words “bicentenary,” “bicentennial,” “200 years,” “Australia,” “Sydney,” “Melbourne,” “Founding” and the figures 1788, 1988 or 88. Consent was needed for articles or goods to bear any combination of those words and figures. Failure to obtain consent would result in the goods being forfeited to the Commonwealth. A group of Indigenous artists produced goods bearing such words without first obtaining consent from the Authority. The issue came before the High Court, which found:

The framework of regulation ... reaches far beyond the legitimate objects sought to be achieved and impinges on freedom of expression by enabling the Authority to regulate the use of common expressions and by making unauthorized use a criminal offence. Although the statutory regime may be related to a constitutionally legitimate end, the provisions in question reach too far.³⁶

To determine the rights compatibility of proposed legislation, the Australian judiciary asks two questions: Does the law burden freedom of expression or some other right or freedom? Is that burden “reasonably appropriate” to achieve a legitimate end that lies within the limits of constitutional power? This principle applies to recently discovered rights, such as the rights to native title,³⁷ as well as entrenched rights and freedoms.

This approach has been criticized because it “can lead to undesirable demarcation disputes about a presumed hierarchy of rights, with additional difficulties in identifying those rights that are supposedly more important than others.”³⁸ The judiciary are not directly concerned with prioritizing rights, however, ranking occurs as a natural consequence of applying the rules of statutory interpretation to assess whether laws faithfully pursue a constitutionally permissible purpose. As former Chief Justice Gleeson questioned in *Coleman v. Power*:

Why should the family’s right to the quiet enjoyment of a public place necessarily be regarded as subordinate to the abusers’ right

³⁴ French, “The Constitution and the Protection of Human Rights”, 2009, p. 27.

³⁵ (1988) 166 CLR 79.

³⁶ *Davis v. The Commonwealth* (1988) 166 CLR 79, 100, 116.

³⁷ French, “The Constitution and the Protection of Human Rights”, 2009, 27.

³⁸ Horrigan, “Reforming Rights-Based Scrutiny and Interpretation of Legislation,” 229.

to free expression of what might generously be described as a political opinion? The answer necessarily involves striking a balance between competing interests, both of which may properly be described as rights or freedoms.³⁹

Tensions arise, therefore, when the courts are called on to review legislation. In exercising the discretionary power inherent in statutory interpretation, the judiciary can refer to international human rights instruments, explanatory memoranda accompanying any bill, as well as statements by the Parliamentary Joint Committee on Human Rights reports on a bill's compatibility with Australia's human rights obligations.⁴⁰ The judiciary is not bound to accept the statement proffered by the legislature for limiting rights, thereby reaffirming the courts' role in legislative review.⁴¹ Consequently, the relationship between politicians and the judiciary can become, at times, very tense, leading to politicians criticizing the courts for judicial activism.

Interpreting and prioritizing human rights is complicated further by Australia's complex government structures. This is particularly evident in states or territories which have enacted their own human rights legislation. For example, the Charter of Human Rights and Responsibilities 2006 (Vic) mandates that "statutory provisions must be interpreted in a way that is compatible with human rights."⁴² Rights-limiting legislation is only permissible where it imposes "reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom."⁴³ When called on to arbitrate the effect of the Charter on a conviction for drug trafficking under the Drugs, Poisons and Controlled Substances Act 1981 (Vic), the Victorian Court of Appeal made a declaration of inconsistent interpretation under Section 36 of the Charter.⁴⁴ Section 5 of the Drugs Act deemed a person in whose premises drugs were found to be in possession of the drugs unless the court could be satisfied to the contrary. The Victorian Court of Appeal concluded that Section 5 of the Drugs Act could not be interpreted consistently with presumption of innocence under Section 25(1) of the Charter.⁴⁵ On appeal, however, the High Court ordered that the declaration be set aside. Gummow, Hayne and Heydon JJ held that Section 36 of the Charter was invalid for impairing the institutional integrity of the Supreme Court.

³⁹ *Coleman v. Power* (2004) 209 ALR 182, para. 32.

⁴⁰ See Acts Interpretation Act 1901, Section 15AB; see also Horrigan, "Reforming Rights-Based Scrutiny and Interpretation of Legislation," 228–29.

⁴¹ Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), Section 8(4).

⁴² Section 32(1).

⁴³ Section 7(2).

⁴⁴ See *R. v. Momcilovic* (2010) VSCA 50; Horrigan, "Reforming Rights-Based Scrutiny and Interpretation of Legislation," 231.

⁴⁵ See *R. v. Momcilovic* (2010) VSCA 50.

French CJ and Bell J held that Section 36 of the Charter was valid but that the High Court could not hear any appeal from a declaration made under that section. Crennan and Kiefel JJ, on the other hand, held that Section 36 of the Charter was valid but the Court of Appeal should not have made a declaration of inconsistent interpretation.⁴⁶

The foregoing analysis reveals the complexity of freedom of speech and human rights protection in Australia. The intrinsic value of freedom of speech does not give rise to an enforceable legal right. Rather, it operates to limit the ability of laws to restrict freedom of speech, without clear and unambiguous justification. Therefore, the common law and legislative principles of statutory interpretation provide a *constitutional foundation* for interpreting freedom of speech, which has given birth to the constitutional principle known as the implied freedom of political communication. Furthermore, since 2011, the National Human Rights Framework requires all new legislation to be accompanied by a Statement of Human Rights compatibility justifying rights limiting legislation. The judiciary is not bound to accept this certification when called on to review the rights-compatibility of legislation.⁴⁷

Moreover, the above analysis reveals that both politicians and the judiciary apply a similar methodology when determining the rights-compatibility of legislation that takes account of “any adverse impact upon rights, against the background of available legislative options and rights-limiting justifications.”⁴⁸ Over the past 20 years, this test for determining rights-compatibility has been extensively analyzed, adapted and refined in a series of High Court decisions from 1992 onwards which recognized and entrenched the constitutional principle protecting political communication.

E. The Implied Freedom of Political Communication

The common law rules of statutory interpretation, described above, have given birth to what has become known as the constitutional principle of implied freedom of political communication. First recognized in 1992,⁴⁹ the legal reasoning supporting the implied freedom has changed over time in relation to a number of factors including: The concept of democracy or self-government being invoked; what constitutes political communication; the impact of the freedom on different types of law; and the criteria applied in determining when the implied freedom might override existing laws.

⁴⁶ *Momcilovic v. The Queen & Ors* (2011) HCA 34.

⁴⁷ Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), Section 8(4).

⁴⁸ Horrigan, “Reforming Rights-Based Scrutiny and Interpretation of Legislation,” 232.

⁴⁹ *Nationwide News Pty. Ltd. v. Wills* (1992); *Australian Capital Television v. The Commonwealth* (1992), 177 CLR 1 and 106, respectively.

The fragility of Australia's speech protection stems, in part, from the lack of consistent reasoning supporting the implied freedom. A review of case law in this area reveals four distinct phases in the High Court reasoning in relation to the scope and limitations of the implied freedom, which can be roughly categorized into:

Phase 1: *Nationwide News Pty. Ltd. v. Wills*⁵⁰ and *Australian Capital Television Pty. Ltd. v. Commonwealth*,⁵¹ where the implied freedom of political communication was recognized by a majority of the High Court as an essential precondition of the general principle of representative democracy or representative government enshrined in the Commonwealth Constitution.

Phase 2: *Theophanous v. Herald and Weekly Times*⁵²; *Stephens v. West Australian Newspapers Ltd.*⁵³; and *Cunliffe v. The Commonwealth*,⁵⁴ where the High Court was called on to apply the constitutional principle to existing laws, including the common law of defamation.

Phase 3: *Lange v. Australian Broadcasting Corporation*⁵⁵ where the High Court reviewed the status and effect of the constitutional principle, resulting in the first "unanimous" and authoritative statement that the text and structure of the Commonwealth Constitution gave rise to an implied freedom of political communication.

Phase 4: *Coleman v. Power*⁵⁶ and *Monis v. The Queen*,⁵⁷ where the High Court confirmed the principles of *Lange* but provided greater context on what constitutes political communication, what constitutes a burden on speech and how the standard of review is to be applied.⁵⁸

Inconsistency in reasoning within the High Court between 1992 and 1995 meant the status and effect of the implied freedom was unclear. In Phases 1

⁵⁰ (1992) 177 CLR 1.

⁵¹ (1992) 177 CLR 106.

⁵² (1994) 182 CLR 104.

⁵³ (1994) 182 CLR 211.

⁵⁴ (1994) 182 CLR 272.

⁵⁵ (1997) 189 CLR 520.

⁵⁶ (2004) 209 ALR 182.

⁵⁷ (2013) HCA 4.

⁵⁸ See also E. Arcioni, "Developments in Free Speech Law in Australia: *Coleman* and *Mulholland*," *Federal Law Review* 33 (2005): 333–54.

and 2, members of the High Court treated “representative government” as a free-standing constitutional principle thus freedom of political communication was an essential precondition to the general principle of representative democracy or representative government enshrined in the Commonwealth Constitution. The freedom was seen to arise independently of the text within the Constitution. This broad interpretation raised questions about the limits of the implied freedom and the type of democracy being protected. For example, ACTV emphasized the rights of individual speakers, suggesting a broad application of the implied freedom that might extend to individual rights. Such reasoning resonates with the concept of participatory democracy where “individual speakers have autonomous rights of participation in public debate because such rights ‘create the opportunity for democratic citizens to come to identify with the collective will through their own potential active participation.’”⁵⁹

A more moderate or traditional construal by a minority faction of the High Court limited the implied freedom to the *text and structure of the Constitution* whereby the implied freedom protects the institution of representative democracy rather than public participation in the political process. The freedom was a negative immunity that, if violated, gave rise to a right to challenge the validity or interpretation of existing law. Such views align more closely to “top-down” or “institutional” perspectives of democracy where the object of protection is the institution of representative and responsible government, which merely requires “a public debate of sufficient quality and diversity of viewpoints to lay the basis for ‘true collective self determination’ through the exercise of voting rights.”⁶⁰

Uncertainties about the meaning and effect of the implied freedom were settled (to some extent) in 1997, when the High Court was again called on to review the common law of defamation in light of the implied freedom of political communication.⁶¹ In a unanimous decision, the High Court significantly wound back the type of protection derived from the implied freedom of political communication. The court resolved that the implied freedom is a negative immunity, not a positive right. The freedom arises from the text and structure of the Constitution, particularly Sections 1, 7, 8, 13, 24, 25, 28 and 30,⁶² which means the judiciary must interpret the nature and level of speech protection by reference to what is necessary to protect representative and responsible government as described in the Constitution without reference to political theory and principles. Consequently, the freedom protects the institution of representative democracy rather than the rights of people to par-

⁵⁹ Chesterman, *Freedom of Speech in Australian Law*, 28.

⁶⁰ *Ibid.*, 29.

⁶¹ See *Lange v. ABC* (1997) 189 CLR 520.

⁶² *Lange v. ABC* (1997) 189 CLR 520, 557–59.

ticipate in political debate. The freedom is limited to political and government matters, which includes criticism of international politicians. The remedy for infringement of the implied freedom of political communication is a right to challenge the validity or interpretation of general law.⁶³

The High Court in *Lange* also settled the standard to be applied when reviewing the compatibility of law in relation to the implied freedom of political communication. The unanimously agreed test involves asking two questions:

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Secondly, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government... If the first question is answered “yes” and the second is answered “no,” the law is invalid.⁶⁴

In 2004, the High Court in *Coleman v. Power*⁶⁵ was again called on to evaluate the effect of the constitutional principle of implied freedom of political communication on state laws when protestor Patrick Coleman challenged convictions under the Vagrants, Gaming and Other Offences Act 1931 for distributing pamphlets for distributing material with insulting words⁶⁶ and using insulting words in public.⁶⁷ Divisions emerged between the reasoning proffered by the High Court justices in this case, particularly in relation to what constitutes political communication, the effect of the implied freedom on state law as well as the standard of review to be applied to identify when a law infringes the implied freedom.

After considerable deliberation and criticism, the High Court confirmed the two-pronged standard of review set out in *Lange*, but clarified that “both the means used as well as the end pursued by the challenged law must be compatible with the system of government prescribed by the Constitution.”⁶⁸ The slightly modified test asks: Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? If so, does the law have an object that is compatible with the maintenance of the constitutionally prescribed system of rep-

⁶³ See also Arcioni, “Developments in Free Speech Law in Australia,” 334–35.

⁶⁴ *Lange v. ABC* (1997) 189 CLR 520, 567–68.

⁶⁵ (2004) 209 ALR 182.

⁶⁶ Section 7A (1)9c.

⁶⁷ Section 7(1) (d).

⁶⁸ A. Stone and S. Evans, “Australia: Freedom of Speech and Insult in the High Court of Australia,” *International Journal of Constitutional Law*. 4.4 (2006): 680.

representative and responsible government? Is the law reasonably appropriate and adapted to achieving that legitimate object or end?⁶⁹

This test was further clarified in *Monis v. The Queen*. Crennan, Kiefel and Bell JJ⁷⁰ explained the *Lange* test involves a level of proportionality analysis “directed to determining whether the freedom is illegitimately burdened”:

The use of proportionality analysis is a rational response to the enquiry as to how the effect upon a freedom, which is not absolute, may be tested... [I]t is an analysis based in reasonable proportionality [and] ... whether the law is proportionate to the end it seeks to serve.⁷¹

After 20 years, therefore, the test of *reasonable proportionality* seems entrenched as the standard of review to be applied to ascertain whether law burdens the implied freedom of political communication. However, judges are limited to the text and structure of constitution when making such judgments, which has led to the different schools of thought around what is needed to promote representative and responsible government. Stone⁷² contends, however, the views in *Coleman*⁷³ provide the clearest statement yet of the substantive values underscoring the judiciaries interpretation of the freedom of political communication.

In *Coleman*, a majority of the court agreed, “insults are a legitimate part of the political discussion protected by the Constitution.”⁷⁴ However, three justices attached standards of *civility* to the class of speech protected, bringing into focus issues relating to the quality of speech, its effects, and its contribution to political debate.

The then–chief justice, Gleeson, was concerned with the effect of insulting words on people’s capacity to participate in society generally.⁷⁵ His argument emphasized the harm arising from intimidation and role of “Parliament to form the view that threatening, abusive or insulting speech and behaviour may in some circumstances constitute a serious interference with public order.”⁷⁶ Gleeson’s reasoning preempts the concerns articulated by

⁶⁹ See *Coleman v. Power* (2004) 209 ALR 182, 208. This formulation was agreed to by Gummow and Hayne JJ at 229, and Kirby J at 233; *Monis v. The Queen* (2013) HCA 4.

⁷⁰ *Monis v. The Queen* (2013) HCA 4, para. 345.

⁷¹ *Ibid.*, paras. 346 and 347.

⁷² Stone, “Insult and Emotion, Calumny and Invective,” 80.

⁷³ *Coleman v. Power* (2004) 209 ALR 182.

⁷⁴ *Coleman v. Power* (2004) 209 ALR 182, 191, 204, 210, 230, 241.

⁷⁵ *Ibid.*, para. 32.

⁷⁶ *Ibid.*, para. 9.

Trigg⁷⁷ in 2013 around the need to balance competing speech rights and freedoms and to protect people from intimidation:

Why should ... [a] family's right to the quiet enjoyment of a public place necessarily be regarded as subordinate to the abusers' right to free expression of what might generously be described as a political opinion? The answer necessarily involves striking a balance between competing interests, both of which may properly be described as rights or freedoms.⁷⁸

Callinan J, on the other hand, reasoned that insulting words have a propensity to cause violence and do not contribute to political debate: "[I]t is not at all necessary for the effective operation of the system of representative and responsible government in accordance with the Constitution that people go about insulting or abusing one another in or about public places in Queensland."⁷⁹

Relying on the right of voters to make free and informed choices as electors,⁸⁰ Heydon J. argued the freedom of political communication could be constrained to prevent harm arising from the use of insulting words in public places, namely to avoid the risk of disorder or violence; to prevent intimidation of the victims; to avert the risk of causing outrage to individuals or groups (the civility argument).⁸¹ He concluded insulting words do not enlighten voters about their choices. Restrictions imposed on insulting words, therefore, did not unreasonably burden the implied freedom of political communication: "Insulting words do very little to further the benefits which political debate brings. Indeed, by stimulating anger or embarrassment or fear, they create obstacles to the exchange of useful communications."⁸²

Coleman,⁸³ which is the first decision since *Lange* to successfully challenge general law on the grounds of the implied freedom, produced a clear majority view that "a law prohibiting insulting language could only validly prohibit 'political communication' in circumstances in which a violent response is either the intended or reasonably likely result."⁸⁴ Furthermore, there was strong support for the view that a law aimed at promoting civility in public discourse is incompatible with the implied freedom of political communi-

⁷⁷ Trigg, "Freedom of Speech Is Not in Danger in Australia."

⁷⁸ *Coleman v. Power* (2004) 209 ALR 182, para. 32.

⁷⁹ *Ibid.*, para. 299.

⁸⁰ *Ibid.*, para. 331.

⁸¹ See Stone, "Insult and Emotion, Calumny and Invective," 85–89.

⁸² *Coleman v. Power* (2004) 209 ALR 182, para. 330.

⁸³ *Coleman v. Power* (2004) 209 ALR 182.

⁸⁴ Stone, "Insult and Emotion, Calumny and Invective," 84.

cation.⁸⁵ This approach, which shows some affinity with First amendment jurisprudence,⁸⁶ overlooks the concerns most recently articulated by Trigg⁸⁷ and the problems associated with intimidation and vilification. However, *Coleman*⁸⁸ does not rule out that some laws regulating the civility in political communication might not unreasonably burden the implied freedom.

This issue arose in *Monis v. The Queen*,⁸⁹ which introduced another layer of opacity around the level to which laws can control the civility of discourse. In *Monis*, some Justices in the High Court distinguished between offences targeting communication in public and more personal spaces. Mr. Monis was charged with offences under Section 471.12 of the Criminal Code (Cth), which outlaws the use of a postal or similar service “in a way ... that reasonable persons would regard as being, in all the circumstances ... offensive.” Mr. Monis, who was charged after sending letters to the relatives of soldiers killed in service in Afghanistan and a killer of an officer of the Australian Trade Commission (Austrade) in service in Indonesia, claimed s471.12 violated the implied freedom of political communication.

A majority of the newly constituted High Court construed the Section narrowly.⁹⁰ Notwithstanding the narrow interpretation, the majority concluded that the law *did effectively* burden freedom of communication about government and political matters because the section criminalized some forms of political communication. When considering whether the “law is proportionate to the end it seeks to serve,” however, Crennan, Kiefel and Bell JJ found that section of the Criminal Code was compatible with the implied freedom of political communication because it

seeks to deter a particular use of a postal service. It may be taken to recognize a citizen’s desire to be free, if not the expectation that they will be free, from the intrusion into their *personal domain* of unsolicited material, which is seriously offensive.⁹¹

This suggests a greater likelihood of anti-civility laws being upheld if they are targeting communication in personal domains where there is an expectation of privacy rather than purely public forums.

By contrast, French CJ and Hayne J expressed concerns about the broad reaching effects of the legislation. French CJ argued the “very breadth is incom-

⁸⁵ Stone and Evans, “Australia,” 686.

⁸⁶ *Ibid.*, 686.

⁸⁷ Trigg, “Freedom of Speech Is Not in Danger in Australia.”

⁸⁸ *Coleman v. Power* (2004) 209 ALR 182.

⁸⁹ (2013) HCA 4.

⁹⁰ *Monis v. The Queen* (2013) HCA 4, para. 336 and paras. 57–59.

⁹¹ *Ibid.*, para. 320, emphasis added.

patible with its implementation in a way that is consistent with the maintenance of that freedom of communication which is a necessary incident of the system of representative government prescribed by the Constitution.”⁹² Hayne J, on the other hand, emphasized “the elimination of communications giving offence, even serious offence, without more is not a legitimate object or end.”

Political debate and discourse is not, and cannot be, free from passion. It is not, and cannot be, free from appeals to the emotions as well as to reason. It is not, and cannot be, free from insult and invective. Giving and taking offence are inevitable consequences of political debate and discourse. Neither the giving nor the consequent taking of offence can be eliminated without radically altering the way in which political debate and discourse is and must be continued if “the people” ... are to play their proper part in the constitutionally prescribed system of government.⁹³

The foregoing reveals the High Court is again divided on the level of protection political speech requires to safeguard the constitutionally prescribed systems of representative and responsible government.⁹⁴ For example, some High Court justices see “representative and responsible government requiring a civilized political discourse” either publicly to encourage political participation⁹⁵ or in personal domains where there is an expectation of privacy.⁹⁶ The other view⁹⁷ emphasizes the need for a “robust and perhaps aggressive political debate in which hurt feelings and intimidation or discouragement from participation are costs to be borne rather than avoided.”⁹⁸ One interpretation emphasizes political reality and the liberties of speakers. The other view, based on what representative and responsible government should be like, promotes equality and diversity, therefore justifying government intervention to promote greater participation in public debate. The High Court is again fracturing around how to interpret the text and structure of the Constitution, implicitly aligning with different theories and principles of democracy which are not clearly set out in their adjudications.

Moreover, a degree of uncertainty remains around what constitutes political communication. In *Coleman*,⁹⁹ Gleeson CJ highlighted “the vague-

⁹² *Ibid.*, para. 73.

⁹³ *Ibid.*, para. 220.

⁹⁴ *Coleman v. Power* (2004) 209 ALR 182; *Monis* (2013) HCA 4; see also Stone, “Insult and Emotion, Calumny and Invective,” 90.

⁹⁵ Stone, “Insult and Emotion, Calumny and Invective,” 90.

⁹⁶ See *Monis v. The Queen* (2013), per Crennan, Kiefel, and Bell JJ.

⁹⁷ Supported by Justices McHugh and Kirby in *Coleman* and Hayne in *Monis*.

⁹⁸ Stone, “Insult and Emotion, Calumny and Invective,” 90.

⁹⁹ *Coleman v. Power* (2004) 209 ALR 182, para. 28.

ness of concepts such as ‘political debate,’” and words spoken “in the course of communication about governmental or political matters.” In this case, highly insulting and public criticism of police officers was treated as political communication. Subsequent decisions have provided additional insights into what constitutes political communication. However, within the High Court there is a high degree of disagreement. For instance, in *Mulholland v. Australian Electoral Commission*¹⁰⁰ ballot papers were regarded as political communication by a majority of judges. However, Heydon J disagreed, stating a ballot paper is “a communication between the executive government and electors.” To constitute a political communication within the ambit of the implied freedom as derived from the text and structure of Commonwealth Constitution, he reasoned, it must be “part of the process of communicating information with a view to influencing electors to vote for one candidate or another.”¹⁰¹ *Monis* reveals that letters criticizing soldiers and an Austrade officer, which were sent through Australia Post, also fall into the category of political communication.

IV. Conclusions

After reading the foregoing analysis of speech protection in Australia, you would be forgiven for asking, “Where the bloody hell are you?”¹⁰² Like most countries freedom of speech in Australia is protected through a complex tapestry of constitutional principles, common law, legislation and policies. The “value” of speech relative to other rights and freedom is highly dependent on how the judiciary interprets the representative and responsible government outlined in the Federal Constitution. Thus the freedom of political communication depends on the type of democracy judges envision operates or needs to operate in Australia.

From its conception in 1992, the implied freedom of political communication has been expanded, contracted and reshaped. It has been condemned and lauded but it is now an accepted part of Australian constitutional law. Originally seen as offering great hope of expanded protection in the form of individual rights to freedom of political communication, the principle has been recast as a negative immunity on the elected parliament to enact laws that unjustifiably, unreasonably and disproportionately constrain political

¹⁰⁰ (2004) 209 ALR 582.

¹⁰¹ *Mulholland v. Australian Electoral Commission* (2004) ALR 209 582, 679.

¹⁰² ‘Where the bloody hell are you’ was a controversial advertising campaign seeking to attract tourists to Australia. The use of the word ‘bloody’ caused outrage in some countries where the advertisement was aired, resulting in the ad being banned in some countries.

discussion and debate. This principle protects the institution of representative and responsible government as set out in the text and structure of the Constitution rather than the public's right to participate in public debate.

The standard of review required to identify whether the implied freedom of political communication has been infringed has settled over time. The *Lange* test has been reformulated as a "reasonable proportionality" test, which asks whether the law is reasonably appropriate and adapted to serve a legitimate end in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. This proportionality-style analysis is mirrored in a new national framework for scrutinizing rights protection. Under the National Human Rights Framework, statements of compatibility must accompany all new legislation. Legislators are asked to consider factors similar to those taken into account by judges in determining rights compatibility.

Although not bound to accept the justification contained in statement of compatibility, the judiciary is obliged to interpret the scope and limits of the implied freedom based on the text and structure of the constitution. Here we enter murky waters as exemplified in the reasoning in *Coleman*¹⁰³ and *Monis*,¹⁰⁴ which reveals "the courts have a vast degree of discretion in relation to the meaning of freedom of political communication, both in determining particular cases and when articulating the deeper values that define the doctrine."¹⁰⁵

*Monis*¹⁰⁶ and *Coleman*¹⁰⁷ highlight a splintering emerging within the judicial reasoning, split around whether political communication is deduced from existing and/or current political practices or the type of political communication that should take place to give effect to representative or responsible government. This subtle but important difference in approach has major implications for applying the implied freedom, particularly in relation to legislative restrictions targeting anti-civility. Currently, the majority of judges favor robust debate regardless of the risks associated with incivility. Stone¹⁰⁸ cautions however, that judges need to move beyond the constitution to explain the factors being taken into account during this complex and highly evaluative task. She goes on to suggest that the High Court "seem to be positioning the court as the interpreter, and consequently the definer, of our broader political culture" which uphold a "tradition of the irreverent, Australian larrikin"¹⁰⁹

¹⁰³ *Coleman v. Power* (2004) 209 ALR 182.

¹⁰⁴ *Monis v. The Queen* (2013) HCA 4.

¹⁰⁵ Stone, "Insult and Emotion, Calumny and Invective," 95.

¹⁰⁶ *Monis v. The Queen* (2013) HCA 4.

¹⁰⁷ *Coleman v. Power* (2004) 209 ALR 182.

¹⁰⁸ Stone, "Insult and Emotion, Calumny and Invective," 96–97.

¹⁰⁹ Larrikin is an Australian term to describe a person who has little regard for convention, rules and social protocols. Larrikin closely aligns with the US term maverick.

The National Human Rights Framework might provide greater insights into the current political practices; thereby reducing the need for judges to exercise such expansive discretion when reviewing rights compatibility of legislation. Furthermore, the shift from pull to push model FOI heralds a new era of “collaborative” democracy whereby citizen participation goes beyond voting to being involved in government information management and distribution. Whether this translates into a reinterpretation of the text and structure of representative and responsible government within the Commonwealth Constitution is still unknown.

It is clear from the issues arising in *Coleman*¹¹⁰ and *Monis*,¹¹¹ however, that there are unresolved tensions relating to people’s liberty to communicate political and government matters and the need for equality to allow people to participate in political debate and processes. Tolerance is essential in all effective democracies, but Trigg’s warning¹¹² suggests Australia’s implied freedom of political communication has not satisfactorily resolved these tensions. Thus the story of the implied freedom and Australia’s speech freedom jurisprudence is incomplete. Another chapter in the history of speech protection is likely to emerge as Australia works toward developing a suitable framework for reconciling the frictions arising from its irreverent larrikin heritage and the need for tolerance and respect to promote an inclusive multicultural society. Thus greater clarity and certainty is needed around the value being attributed to speech, why its protection is desirable and how it should be protected relative to other rights.

¹¹⁰ *Coleman v. Power* (2004) 209 ALR 182.

¹¹¹ *Monis v. The Queen* (2013) HCA 4.

¹¹² Trigg, “Freedom of Speech Is Not in Danger in Australia.”

The Impact of New Media on Freedom of Expression in China and the Regulatory Responses¹

MEI NING YAN

I. Introduction

Thanks to the increasing popularity of the Internet and mobile phones, Chinese citizens were enjoying greater freedom of expression at the beginning of the 21st century.² The expanded freedom of expression associated with new media gradually gave rise to online activism that became increasingly prevalent with the introduction of Web 2.0 applications, in particular blogs and microblogs. Mindful of the “Twitter revolution” overseas, the ruling Chinese Communist Party (CCP) introduced tougher measures to tame new media—an obvious trend in the post–Beijing Olympics era starting in late 2008.

This was set against a general background that the Chinese government had since the mid-1990s devised numerous regulatory and control projects—notably the content barrier known informally as the “Great Firewall”—to confine new media mainly to communication, economic and entertainment purposes and to prevent them from acting as tools of democracy. In this regard, China serves as a vivid illustration of how freedom of expression can be expanded or restricted through the interplay between advances in media technologies, the opening up of domestic markets and adoption of international trade rules on one hand, and the regulatory responses devised by the

¹ The author would like to express her gratitude to Professor Ying Chan, former Dean of the Cheung Kong School of Journalism and Communication at Shantou University, for advice given during the writing of this chapter and to several lawyers and media practitioners, who prefer to remain anonymous, for their background briefings.

² This chapter covers only the situation in mainland China—not that in Hong Kong, Macau or Taiwan—and describes developments up to mid-2013.

authorities on the other. In this process, no single factor has proven to be pre-dominant or decisive.³

II. New Media, the Expanded Scope of Freedom of Expression, and the Rise of Online Activism

The Chinese Internet population grew to 591 million in mid-2013.⁴ More than 78 percent of these Internet users went online via their mobile phones, 464 million in all.⁵ A nationwide survey in early 2012 showed that 36 percent of the industrial workers interviewed spent more than five hours online daily via mobile phone.⁶

A. Chinese Netizens: Active Publishers and a New Opinion Class

A sizable class of Internet users equipped with powerful, interactive mobile communication devices emerged. Taking advantage of the egalitarian nature of the Internet, many Chinese netizens not only had access to alternative sources of information and ideas but also became active publishers. In the Web 2.0 era, blogging, video sharing, social networking websites and tweeting became hugely popular and combined to bring about a metamorphosis of the Chinese Internet. In mid-2008, General Secretary Hu Jintao of the CCP, when visiting the official CCP mouthpiece, *People's Daily*, made significant observations regarding the Internet, portraying it as a venue for disseminating ideas and information and a magnifying glass for public opinion.⁷ Also in 2008, *People's Daily* established the Public Opinion Monitoring Department, which in its first major research project proclaimed that Chinese netizens had formed a new opinion class.⁸ In 2009, the same department further noted that

³ See, generally, M. Price, *Media and Sovereignty: The Global Information Revolution and Its Challenge to State Power* (Cambridge, MA: MIT Press, 2002), for discussions of factors affecting media regulation and the adjustments between them.

⁴ CNNIC, *The 32nd Survey Report on Internet Development in China* (2013), 11 (in Chinese).

⁵ *Ibid.*, 12.

⁶ "Internet Access by Mobile Phones Has Become the No. 1 Way for China's Blue-Collar Workers to Seek Information," Xinhua News Agency, 17 May 2012 (in Chinese), available at http://news.xinhuanet.com/tech/2012-05/17/c_123144315.htm.

⁷ See Hu Jintao's speech during his visit to the *People's Daily* on 20 June 2008 (in Chinese), available at <http://politics.people.com.cn/GB/1024/7408514.html>.

⁸ H. Zhu et al., "An Analysis of China's Online Public Opinion 2008" (2008) (in Chinese), available at <http://media.people.com.cn/GB/22114/52789/115416/6852601.html>.

online forums had become an important and independent source of news, and that 23 of the 77 most strongly debated social incidents in that year originated in postings by netizens.⁹

The impact of the Internet was closely related to the wider social and political environment. This was especially true in relation to the increasing prominence of online activism. The year 2008 was a case in point. Along with the Olympic Games, the Chinese government and its people encountered and endured many other incidents of great significance: snowstorms in January, the Tibet riots in March, the Sichuan earthquake in May, and the tainted milk product scandal after the Olympics. Chinese netizens were actively involved throughout. Apart from closely following and commenting on news reports, netizens engaged in breaking news regarding the Sichuan earthquake, in organizing relief work for the snowstorms and earthquake, and in investigating the number of students killed when school buildings collapsed during the earthquake and why those buildings were of such a poor quality.¹⁰

B. Synergy between New and Old Media

Internet and mobile phone communication facilitates online activism, which in turn promoted action in the real world. Throughout 2008, the use of online manhunts, a phenomenon commonly known among Chinese netizens as the “human flesh search engine,” exposed malpractice and corruption by local officials.¹¹ The case of Deng Yujiao in mid-2009 drew nationwide attention, attracting an estimated 25,000 postings (excluding follow-up remarks) in five popular online communities.¹² The *People’s Daily’s* Public Opinion Monitoring Department ranked the incident first among the 15 most contentious social topics of 2009. Deng, a 21-year-old waitress, was detained by the police and sent to a mental hospital for fatally stabbing a local official who had reportedly made sexual advances on her.¹³ Footage of Deng strapped to a hospital bed screaming for help, first broadcast on local television, was soon widely circulated on the Web.¹⁴ Support for Deng was overwhelming among

⁹ H. Zhu et al., “An Analysis of China’s Online Public Opinion 2009” (2009) (in Chinese), available at <http://yq.people.com.cn/htmlArt/Art392.htm>.

¹⁰ R. Zhou, “Delighted by the Rise of a New Class of Public Opinion Makers,” *Southern Metropolis Daily* (Guangzhou), 2 January 2009, A23 (in Chinese).

¹¹ T. Ng, “Net Exposé Leads to Official’s Jailing,” *South China Morning Post* (Hong Kong), 12 October 2009, 7.

¹² See Zhu, *supra* note 9.

¹³ For an account of the incident, see R. Li, “Web of Support: The Millions of Internet Users on the Mainland Are a Powerful Force in Shaping Public Opinion,” *South China Morning Post* (Hong Kong), 10 June 2009, 11.

¹⁴ L. He, “A Shivering Badong,” *Xinmin Weekly* (Shanghai), 29 June 2009, 14 (in Chinese).

netizens. She was perceived as a heroine, an icon for the underdog, for daring to resist oppression by immoral and corrupt officials.¹⁵ The incident also provided a vivid illustration of synergy between new and old media. Encouraged by online activism, some print journalists also flocked to Badong, the remote town where the killing took place.¹⁶ The Publicity Department of the CCP Central Committee (still more commonly known as the Central Propaganda Department) soon issued a gag order requiring media outlets to stick to officially sanctioned reports and to recall reporters from Badong.¹⁷ Websites began to delete postings relating to Deng, but some netizens used a microblog website to organize “netizen tours” to Deng’s trial in Badong.¹⁸ Several hundred people gathered outside the court when Deng was tried for the lesser offense of assault.¹⁹ Prevented from entering the courtroom, netizens broadcast live updates from outside using their mobile phones.²⁰ Deng was convicted after a short trial but walked free after the court found her to be suffering from a minor mental illness and spared her any punishment.

C. The Power of Weibo

Events related to Deng and other similarly spectacular online incidents illustrated the vigor of social media and showed the intensification of online activism in China. The case of Tang Hui bore similarities to the Deng incident.²¹ It also demonstrated the power of Sina Weibo (Weibo), a microblog service resembling Twitter in the West. Tang was sent to a labor camp for 18 months by local police without a court trial in August 2012 for seriously disrupting social order and exerting a negative impact on society after staging repeated protests in Yongzhou, Hunan Province. Tang complained that local police had falsified evidence resulting in lighter sentences for several men who had

¹⁵ R. Li, “An Icon for the Underdog in an Unfair Society,” *South China Morning Post* (Hong Kong), 7 June 2009, 5.

¹⁶ K. Wang, “My Experience in Reporting on the Deng Yujiao Incident” (2009) (in Chinese), available at <http://wangkeqin.blog.sohu.com/118926307.html>.

¹⁷ R. Li and V. Wu, “Media Gag over Stabbing,” *South China Morning Post* (Hong Kong), 27 May 2009, 11.

¹⁸ Y. Li, “Spread of Twitter Revolution: From Iran to China,” *Yazhou Zhoukan* (Hong Kong), 5 July 2009, 44 (in Chinese).

¹⁹ See He, *supra* note 14.

²⁰ “Netizens Celebrated Victory upon Freeing of Deng Yujiao; Grassroots Netizens Demonstrate the Strength of China’s Civil Society,” *Yazhou Zhoukan* (Hong Kong), 28 June 2009, 8 (in Chinese).

²¹ T. Branigan, “Outcry in China over Mother Sent to Labor Camp after Daughter’s Rape,” *The Guardian* (London), 16 August 2012, available at <http://www.guardian.co.uk/world/2012/aug/16/china-tang-hui-labour-camp>.

kidnapped and raped her 11-year-old daughter and forced the girl into prostitution. Tang's ordeal sparked a public outcry. The state-run Xinhua News Agency (Xinhua) reported that there were some 700,000 posts about Tang on Weibo, and most of the posts expressed sympathy for Tang.²² Some netizens launched a one-person-one-tweet campaign to rescue Tang. *People's Daily* and several other traditional media outlets followed the story and published criticism via Weibo. Tang was released within days, and was eventually awarded compensation for her detention in mid-2013. Western media remarked that the web-based rage had forced the authorities to yield, and the victory enshrined Tang as a symbol of the growing political muscle of China's Internet users.²³

Just weeks before Tang's case, China's strict one-child policy and its related birth control scheme were also put under public scrutiny online when a young, heavily pregnant woman was subjected to a forced abortion because she already had a daughter.²⁴ An angry relative used her mobile phone to take and upload onto Weibo a gruesome photograph showing the blood-stained body of the baby lying next to its mother on a hospital bed.

Weibo was also deployed in another dramatic incident in September 2010.²⁵ Several members of a family in Yihuang County, Jiangxi Province, set themselves alight during a forced demolition of their home. One died and two others were seriously injured. Two sisters from the family set off to Beijing to petition but were pursued by local officials. They hid in a toilet at Nanchang Airport, calling media outlets for help. Eventually a journalist came to their rescue, and the ordeal of the two sisters was broadcast by another journalist on Weibo.

Similarly, after flash floods in Beijing on 21 July 2012, many Chinese resorted to Weibo to find out if friends and relatives were safe and to criticize the capital's poor drainage system and officials' slow response.²⁶ The authorities tried to play down the scale of the disaster but later had to admit a death toll of 77 when details were uncovered by netizens on Weibo.²⁷ The power of Weibo to report disasters was first highlighted in July 2011 when two high-

²² "Probe Launched after Petitioning Mother is Sent to Labor Camp," Xinhua News Agency, 8 August 2012 (in Chinese), available at http://www.china.org.cn/china/2012-08/08/content_26175419.htm.

²³ L. Lewis, "Victory for Mother in China Held over Campaign for Raped Daughter," *The Times* (London), 16 July 2013.

²⁴ See C. MacLeod, "Forced Abortion Ignites Online Outrage; Chinese Protest Limit on Families," *USA Today*, 15 June 2012, 5A.

²⁵ M. Zuo, "How a Woman's Microblog Helped Seek Justice in Beijing for Eviction," *South China Morning Post* (Hong Kong), 20 September 2010, 6.

²⁶ C. MacLeod, "In China, Upbeat Flood News Raises Ire; Critics Say Censors Minimizing Disaster," *USA Today*, 27 July 2012, 5A.

²⁷ *Ibid.*

speed trains collided near Wenzhou, a city in eastern China. Netizens disseminated their eyewitness accounts online, expressed their outrage at poor safety standards, heavily criticized the badly organized rescue operation and queried whether officials had attempted to cover up wrongdoing by hastily burying the carriage.²⁸

In the major northeastern city of Harbin in August 2012, a section of a recently completed bridge collapsed.²⁹ Soon afterwards, Weibo were full of live reports sent by local eyewitnesses. Netizens complained of the poor construction quality and pointed fingers at possible corruption. A Canadian journalist noted that before the city's party secretary could put forward his explanation via Xinhua, he had already been judged in the court of Weibo.³⁰

When the outspoken *Southern Weekend* was subject to a new round of censorship in early 2013, some netizens not only staged protests outside the publication's headquarters but also posted snapshots on Weibo showing them holding placards with remarks supportive of freedom of expression.³¹ A series of scandals about child sexual abuses by headmasters and teachers erupted in May 2013. Among the protesting netizens who posted snapshots was Professor Ai Xiaoming, whose photo showed her half-naked body painted with remarks to mock China's lack of protection of schoolgirls.³²

Indeed, with the rise of new media, the Chinese people were no longer a passive audience confined by what they could read or watch in the old media, which remained largely state-run. Since coming into being in late 2009, Weibo sustained online activism and played a significant role in communication, publicity and mobilization for the mass demonstrations and public protests that had become frequent throughout China in the past decade. Environmental issues such as deadly pollution caused by huge chemical plants, or conflicts relating to abuse of power by local officials such as forced evictions, were common causes of public outcry or unrest. The Internet rapidly spread far and wide the news of local protests and clashes. Protestors and victims alike routinely resorted to Weibo to appeal for support nationwide. Some lawyers and academics also actively used Weibo to call for justice, policy changes and reform.

²⁸ M. Wines and S. LaFraniere, "In Baring Facts of Train Crash, Blogs Erode China Censorship," *New York Times*, 29 July 2011, A1.

²⁹ M. MacKinnon, "In China, 300 Million Mouses Roar; But Is the Lion Scared?" *Globe and Mail* (Toronto), 8 September 2012, 24.

³⁰ Ibid.

³¹ For the *Southern Weekend* incident, see, generally, C. MacLeod, "Battle Lines Drawn over China's Censorship; Activists Rally to the Side of Gritty Newspaper," *USA Today*, 9 January 2013, 4A.

³² L. Mudie, "Chinese Rights Activist Detained after Anti-Child Abuse Campaign," *Radio Free Asia News and Information*, 31 May 2013.

III. Regulatory Responses to New Media (1994–2008)

New media technologies were nevertheless unable to exert their full potential influence. The Chinese government insisted on a command-and-control regime over all domestic mass media and at the same time emphasized sovereign control over the flow of information from overseas jurisdictions.³³

A. The Great Firewall and Prohibited Online Content

The Internet was opened up in 1995 for public use in China.³⁴ The Chinese government's construction of its Great Firewall was accomplished in the early stages simply by an extension of the control techniques long applied to print and broadcast media.³⁵ Between 1994 and 1998, the Chinese government issued several legislative enactments that established a hierarchy of controls over access to the outside world via the Internet.³⁶ All Internet traffic to and from the outside world had to go through public telecommunication links.³⁷ Only backbone network operators, otherwise known as Internet access providers, were allowed connections to public telecommunication links, and they served as limited gateways for Internet service providers (ISPs). A major restructuring of China's telecommunications industry in 2008 left only six backbone network operators, all under close scrutiny by the Chinese authorities.³⁸

A comprehensive regulation was issued in 1997 detailing strict control of online activities and content.³⁹ Prohibited activities included the use of

³³ "Overseas" is a general term. In China, a specific legal term "outside border" (*jing-wai*) is used to refer to jurisdictions outside mainland China, which include Taiwan, Hong Kong and Macau.

³⁴ CNNIC, "China's Internet Developments, 1994–96" (in Chinese), available at http://research.cnnic.cn/html/2009-05-26/1243316017d526_1.html.

³⁵ For a comprehensive description of the control techniques in the 1990s, see J. Qiu, "Virtual Censorship in China: Keeping the Gate between the Cyberspaces," *International Journal of Communication Law and Policy* 4 (1999): 1.

³⁶ Two major pieces of legislations are Provisional Provisions on the Management of International Connection of Computer Information Networks (Zhonghua renmin gongheguo xinxi wangluo guoji lianwang guanli zanxing guiding [97 xiuzheng]), first issued in 1996 and amended in 1997, State Council Decree No. 218 (1997), and its implementation rules (Zhonghua renmin gongheguo jisuanji xinxi wangluo guoji lianwang guanli zanxing guiding shishi banfa), issued in 1998.

³⁷ *Ibid.*, State Council Decree No. 218 (1997).

³⁸ CNNIC, *supra* note 4, 25.

³⁹ Management Measures on Security Protection of International Connection of Computer Information Networks (Jisuanji xinxi wangluo guoji lianwang anquan bao hu guan li ban fa), Ministry of Public Security Decree No. 33 (1997).

international network connections to endanger national security and divulge state secrets.⁴⁰ Moreover, ISPs were to be monitored, inspected and supervised by the police for security purposes.⁴¹ Internet users were required to fill in a registration form prepared by the Ministry of Public Security when applying for ISP services.⁴²

Nine categories of online content were prohibited, namely content that: (1) incited resistance to or undermined the implementation of the constitution, laws and administrative regulations; (2) incited subversion of state power and the overthrow of the socialist system; (3) incited secession or undermined the unification of the country; (4) incited hatred or discrimination among ethnic groups or undermined ethnic unity; (5) disrupted social order by fabricating or twisting facts, or by spreading rumors; (6) propagated feudal superstitions, obscene and pornographic content, gambling, violence, murder or horror, or instigated commission of crime; (7) publicly insulted others or fabricated facts to defame others; (8) harmed the reputation of state organs; and (9) any other content that violated the constitution, laws or administrative regulations.⁴³

B. Censorship by Filtering and Engaging Nonstate Actors

The Great Firewall had turned China into a de facto state intranet by the late 1990s, but the authorities stepped up monitoring for obvious reasons.⁴⁴ Ten thousand followers of Falun Gong, a spiritual group later banned, gathered in April 1999 to meditate around Zhongnanhai, the headquarters of the CCP and the Chinese government.⁴⁵ The protesters reportedly liaised by e-mail to organize the demonstration, which was the largest staged in Beijing since the 1989 democracy movement.⁴⁶ US president Bill Clinton predicted several months later that liberty would spread through mobile phones and cable modems in the 21st century and further noted: "Now, there's no question China has been trying to crackdown on the Internet—good luck. That's sort of

⁴⁰ Ibid., Article 4.

⁴¹ Ibid., Article 8.

⁴² Ibid., Article 11.

⁴³ Ibid., Article 5.

⁴⁴ See Z. Tan, "Regulating China's Internet: Convergence towards a Coherent Regulatory Regime," *Telecommunication Policy* 23 (1999): 261, 272, for the observation of state intranet.

⁴⁵ "Sect 10,000 Protest in Beijing," *Hong Kong Standard* (Hong Kong), 26 April 1999.

⁴⁶ See G. Yang, *The Power of the Internet in China: Citizen Activism Online* (New York: Columbia University Press, 2009), 66.

like trying to nail Jell-O to the wall.”⁴⁷ Not surprisingly, as many as seven legislative enactments on Internet control were issued in 2000. Over the next few years, several more were promulgated, joining to impose an elaborate control scheme that incorporated detailed regulation of ISPs and Internet content providers (ICPs), electronic bulletin board services, online news, online publishing and Internet cafes, and measures governing Internet safety.

Legislative enactments delegated day-to-day monitoring and censorship to nonstate actors, and the role of ISPs and ICPs as censors was well-established by the early 2000s. ISPs were to maintain logs of the activities of Internet users, including user registration numbers and dial-up telephone numbers, online duration and URLs visited.⁴⁸ These records were to be kept for 60 days and produced for inspection upon request by government departments. ICPs were to keep records of online information posted on websites and electronic bulletin boards, the time of posting, and IP addresses or domain names.⁴⁹ Once prohibited content was detected, ICPs were required to stop the flow of information, to record the incident and to report to the authorities.⁵⁰

Online information became subject to prior restraint. Multiple advanced techniques were employed to block, filter or intercept prohibited or sensitive content.⁵¹ Human censors from ISPs and ICPs also conducted postpublication monitoring of online content and postings. Noncommercial ICPs and some BBSs (bulletin board systems) recruited volunteers to act as net nannies by deleting postings or blogs on their own initiative or on order from the Chinese authorities.

The collaborative relationship between ICPs and the Chinese government also applied to foreign companies such as Yahoo!, Microsoft and Google, which were allowed to operate in China as joint ventures with Chinese entities after China's accession to the World Trade Organization (WTO) in late 2001.⁵² In 2005 and 2006, these American companies were sub-

⁴⁷ Address by Bill Clinton at Johns Hopkins University regarding permanent normal trade relations status for China, 8 March 2000, available at <http://www.techlawjournal.com/cong106/pntr/20000308sp.htm>.

⁴⁸ Measures on the Management of Internet Information Services (Hulianwang xinxi fuwu guanli banfa), State Council Decree No. 292 (2000), Article 14.

⁴⁹ Ibid.

⁵⁰ State Council Decree No. 292 (2000), *supra* note 48, Article 16.

⁵¹ For a detailed account, see Open Net Initiative, “Internet Filtering in China” (2009), available at http://opennet.net/sites/opennet.net/files/ONI_China_2009.pdf.

⁵² For China's commitments to opening up its telecommunications market and related value-added services, see Trade in Services: The People's Republic of China: Schedule of Specific Commitments, GATS/SC/135, 14 February 2002, available on the WTO website. See also WTO, “WTO Successfully Concludes Negotiations on China's Entry,” press release, 17 September 2001, available at http://www.wto.org/english/news_e/pres01_e/pr243_e.htm.

jected to severe criticism in the United States for compromising their corporate responsibility.⁵³ The handing over of user information by Yahoo! China to the police resulted in the arrest of cyber-dissidents Li Zhi in 2003 and Shi Tao in 2005, and long prison terms were imposed on them.⁵⁴ Google was criticized for complying with Chinese censorship rules and for producing limited or altered results for sensitive terms such as “Tiananmen crackdown” or “democracy” in its China-based search engine.⁵⁵

Besides engaging nonstate censors, the Ministry of Public Security set up its cyberpolice unit in 1998 and also initiated the Golden Shield Project, which eventually built a nationwide digital monitoring and censorship system.⁵⁶ In addition, the ministry, several other government departments and some portals designed online mechanisms to facilitate the reporting of illicit activities or content by netizens.⁵⁷

In early 2010, US Secretary of State Hillary Clinton gave a high-profile speech campaigning for Internet freedom. Although encouraged by an unprecedented surge in connectivity and enormous changes brought by the Internet, Hillary Clinton admitted that “virtual walls are cropping up in place of visible walls,” and that with the spread of restrictive practices in China and some other countries, “a new information curtain is descending across much of the world.”⁵⁸

The Great Firewall was certainly not watertight; the use of proxy websites and VPNs (virtual private networks) by Chinese netizens to get around this barrier was well-documented.⁵⁹ Netizens also zealously invented various substitutes for sensitive phrases so as to escape filtering and detection. In practice, many censors tolerated online postings on hot topics and only deleted them upon clear instructions from the Chinese authorities.

⁵³ US House Committee on International Relations, *The Internet in China: A Tool for Freedom or Suppression?* Joint Hearing before Subcommittee on Africa, Global Human Rights and International Operations and Subcommittee on Asia and the Pacific, 109th Congress, 2nd Session, 15 February 2006, available at <http://www.foreignaffairs.house.gov/archives/109/26075.pdf>.

⁵⁴ *Ibid.*, 2.

⁵⁵ *Ibid.*, 30.

⁵⁶ “China: Beijing Developing Internet Control Device,” *BBC Worldwide Monitoring*, 20 March 2001.

⁵⁷ See <http://www.cyberpolice.cn/index2.jsp> (in Chinese).

⁵⁸ H. Clinton, “Remarks on Internet Freedom,” a speech made at the Newseum, 21 January 2010, available at <http://www.state.gov/secretary/20092013clinton/rm/2010/01/135519.htm>.

⁵⁹ See, for example, D. Pierson, “Despite Censorship, Cracks Widen in China’s Great Firewall,” *Los Angeles Times*, 16 January 2010, available at <http://articles.latimes.com/2010/jan/16/business/la-fi-china-firewall16-2010jan16>.

C. Stopping Unauthorized Online News Outlets and Citizen Journalism

Few legislative enactments on Internet regulation were issued in the past decade, with two major exceptions further restricting the provision of online news and audiovisuals. The Central Propaganda Department issued orders on a daily basis banning topics from being reported in print and broadcast media, and news media were only allowed to publish official accounts of sensitive events or topics prepared by Xinhua.⁶⁰ The Internet, however, brought about the possibility of endless publication outlets and instant publication. By imposing a strict regime on online news provision, the party-state hoped to maintain the pre-Internet practice of ready blackout of certain news items.

A legislative enactment issued in 2005 confined the provision of online news to qualified domestic media outlets.⁶¹ Entities from overseas or joint ventures with overseas input were banned from providing online news.⁶² Security clearance had to be obtained before licensed online news providers could conduct news-related business with overseas entities or joint ventures.⁶³ Web portals could not conduct newsgathering and had to sign written agreements with licensed news websites before they could reprint news from these websites, and source had to be specified in reprinted news items.⁶⁴

Rules on press cards were tightened in 2009.⁶⁵ News reporting had to be conducted by journalists accredited by the General Administration of Press and Publication (GAPP), a government department responsible for licensing print media and journalists. A GAPP spokesman specifically refuted the saying that anyone with a digital video camera could be a journalist, thus banning citizen journalism.⁶⁶

⁶⁰ For a list of gag orders handed down by the CCP's Central Propaganda Department in 2009, see International Federation of Journalists, "China Clings to Control: Press Freedom in 2009" (2010), 9–12.

⁶¹ Provisions on the Management of Internet News Services (Hulianwang xinwen xinxi fuwu guanli guiding), State Council's Information Office and Ministry of Information Industry Joint Decree No. 37 (2005). This replaced a legislative enactment issued in 2000 on online news, Provisional Provisions on the Management of News Publishing on Websites (Hulianwang congshi dengzai xinwen yewu guanli zanxing guiding). The Ministry of Information Industry was dissolved in 2008, and its functions were taken up by the new Ministry of Industry and Information Technology (MIIT).

⁶² Ibid., Article 9.

⁶³ Ibid.

⁶⁴ State Council's Information Office and Ministry of Information Industry Joint Decree No. 37, *supra* note 61, Articles 16 and 17.

⁶⁵ Measures on the Management of Press Cards (Xinwen jizhezheng guanli banfa), GAPP Decree No. 44 (2009).

⁶⁶ "A Briefing by GAPP Spokesman on Press Card Revised Rules," 12 October 2009 (in Chinese), available at <http://www.scio.gov.cn/xwfbh/gbwxwfbh/xwfbh/xw-cbzs/200910/t432011.htm>.

The new legislative enactment in 2008 tackled the growth of video-sharing websites and the increasing popularity among netizens of uploading videos.⁶⁷ The official explanation was the need to protect minors from harmful online content and to protect copyright.⁶⁸ Only entities owned or controlled by the state and equipped with qualified technology and personnel could apply for a license to provide services involving the production, editing or compilation of audiovisual programs for public dissemination on the Internet or the uploading for others of audiovisual programs.⁶⁹ Separate licenses for broadcasting or online news provision were required for online radio or television, talk shows, or news reporting.⁷⁰ Only licensed operators could upload videos for private individuals, but news items on current affairs and politics were prohibited.⁷¹ Licensed operators were also to remind customers not to upload news items when writing blogs or sharing videos.⁷² No entities or individuals were allowed to repost, link to or create programs originating from pirate radio or television channels or illicit websites.⁷³

IV. Counteracting Online Activism since Late 2008

China lifted its Great Firewall and allowed press freedom during the Olympic Games in 2008 to accommodate the needs of athletes, journalists and visitors from outside China.⁷⁴ However, political and media controls were obviously tightened in the post-Beijing Olympics era. Both YouTube and Facebook became inaccessible in China by mid-2009.⁷⁵ As of mid-2013, the two websites remained blocked.

Indeed, the CCP General Secretary Hu Jintao reminded officials and journalists just before the Beijing Olympics to be fully aware of the social

⁶⁷ Provisions on the Management of Internet Audiovisual Program Services (Hulianwang shiting jiemu fuwu guanli guiding), SARFT and MIIT Joint Decree No. 56, came into force on 31 January 2008. SARFT is the acronym for the State Administration of Radio, Film and Television.

⁶⁸ "A Briefing by SARFT and MIIT Spokesman on the Provisions on the Management of Internet Audiovisual Program Services," 3 February 2008 in Chinese), available at <http://www.sarft.gov.cn/articles/2008/02/03/20080203181311570690.html>.

⁶⁹ SARFT and MIIT Joint Decree No. 56, *supra* note 67, Article 8.

⁷⁰ *Ibid.*, Article 9.

⁷¹ Article 17.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ J. Lau and C. Yang, "Underwater Tunnel to Cross-Border College in China: Ex-Colony's University Shifts to Mainland but Brings with It Macau Law," *International Herald Tribune*, 15 July 2013, 7.

⁷⁵ S. Bass, "China's Facebook Status: Blocked," *ABC News*, 8 July 2009, available at <http://abcnews.go.com/blogs/headlines/2009/07/chinas-facebook-status-blocked/>.

influence of the Internet as a new medium and to set high priorities in building and managing it.⁷⁶ The Minister for Public Security, Meng Jianzhu, warned in late 2009 that the Internet had become an important means through which anti-China forces could infiltrate, sabotage and magnify their capabilities for destruction.⁷⁷ Meng called for a comprehensive security system covering both the real and virtual worlds.⁷⁸

In view of the Xinjiang riots in July 2009, an article in *People's Liberation Army Daily* urged the adoption of effective measures to prevent the Internet from becoming a dangerous weapon in the hands of hostile forces.⁷⁹ The article also detailed the strong subversive power of the Western websites Twitter, YouTube, Facebook and Flickr, highlighting the Twitter revolution in Moldova and Iran.⁸⁰ China media expert Qian Gang observed that the Chinese government had been devising new information-management regulations, part of the measures taken in various countries that came to be known informally as "Control 2.0," intended to counteract Web 2.0.⁸¹

A. The Green Dam Initiative

In what was widely perceived as a controversial plan, the Chinese authorities required every computer sold in the country from 1 July 2009 onward to include preinstalled filtering software known as "Green Dam—Youth Escort."⁸² The stated aim was to protect minors from "unhealthy informa-

⁷⁶ See Hu Jintao's speech, *supra* note 7.

⁷⁷ J. Meng, "Boosting Strength in Five Areas; Improving Standard of Maintaining Stability, *Qiushi* (Beijing), 1 December 2009 (in Chinese), available at http://www.qstheory.cn/zxdk/2009/200923/200911/t20091127_16024.htm. See also S. LaFraniere, "Censors Put Tighter Grip on Internet in China," *New York Times*, 18 December 2009, A18.

⁷⁸ "Top police Officer Wants Security Both Online and Offline," *ChinaDaily.com.cn*, 3 November 2009.

⁷⁹ Y. Chi, "Subversion by the Net: Don't Overlook Its Threat to Safety," *PLA Daily* (Beijing), 6 August 2009 (in Chinese), available at http://www.chinamil.com.cn/gfbmap/content/2009-08/06/content_4350.htm.

⁸⁰ *Ibid.* See also T. Ng, "Warning over Twitter: YouTube 'Subversion'; Hostile Forces Exploiting Web Tools, Article Says," *South China Morning Post* (Hong Kong), 7 August 2009, 8.

⁸¹ G. Qian, "'Hide and Seek' and Step up of News Control (Control 2.0)," *Media Digest* (Hong Kong), April 2009 (in Chinese), available at http://www.rthk.org.hk/media-digest/20090415_76_122221.html. See also "Repression 2.0: Totalitarian States Are Learning to Control Citizens by Creating the Impression of Ubiquitous Surveillance," *Newsweek*, 14 April 2008.

⁸² MIIT, "Notice on Pre-Installing Green Filtering Software on Computers" (Guanyu jisuanji yuzhuang lvse shangwang guolv ruanjia de tongzhi), 19 May 2009, available at <http://www.miit.gov.cn/n11293472/n11293832/n11293952/12398220.html>.

tion" online, a general reference to pornography and violence. The Green Dam performed several functions, including blocking pornographic content, filtering "unhealthy information" and limiting online hours.⁸³ Moreover, the device could black out the screen every three minutes if it detected that illicit websites were being visited, and could record which websites the computer user had accessed.⁸⁴ The Green Dam plan met severe opposition in China.⁸⁵ Netizens worried that the software would spy on their online activities.⁸⁶

Overseas research revealed that the Green Dam would prevent the use of any sites starting with the letter F if it detected access by users to websites associated with the banned Falun Gong.⁸⁷ The US government publicly called for the revocation of the Green Dam plan.⁸⁸ The European Union asked China to reconsider whether the Green Dam goal of protecting children from harmful online content could be better achieved through a healthy and open dialogue on parental controls.⁸⁹ More than 20 commerce and trade groups representing major global technology suppliers noted that the mandatory requirement "raises significant questions of security, privacy, system reliability, the free flow of information and users' choice."⁹⁰ The preinstallation rule was stalled just hours before it was to take effect.⁹¹ Privacy and freedom of online speech in China remained at risk; however, the Chinese authorities were believed to be equipped with "deep packet inspection" technology that could check email messages and other private online communications for specific keywords.⁹²

⁸³ "All Computers Sold after July 1 Must Be Installed with Green Dam," *Southern Metropolis Daily* (Guangzhou), 9 June 2009, A32 (in Chinese).

⁸⁴ Ibid.

⁸⁵ D. Zhang, "Green Dam Can Be Freely Installed or Dismantled," *Southern Metropolis Daily* (Guangzhou), 10 June 2009, A32 (in Chinese).

⁸⁶ C. Choi, "Scrap Compulsory Filters for Internet, Academics Say," *South China Morning Post* (Hong Kong), 15 June 2009, 8.

⁸⁷ E. Morozov, "Control Issues; China's Internet Plan May Backfire," *Newsweek*, International Edition, 29 June 2009.

⁸⁸ Office of the US Trade Representative, "Secretary Locke and USTR Ronald Kirk Call on China to Revoke Mandatory Internet Filtering Software," press release, 24 June 2009, available at <http://www.ustr.gov/about-us/press-office/press-releases/2009/june/secretary-gary-locke-and-ustr-ron-kirk-call-china-rev>.

⁸⁹ "EU Adds Voice to 'Green Dam' Protests," Reuters, 29 June 2009.

⁹⁰ J. McDonald, "Companies Appeal to China to Drop Web Filter Plan," Associated Press, 27 June 2009.

⁹¹ "China Delays Mandatory Installation of 'Green Dam' Web Filter," *BBC Monitoring Asia-Pacific-Political*, 30 June 2009.

⁹² C. Rhoads and L. Chao, "Iran's Web Spying Aided by Western Technology: European Gear Used in Vast Effort to Monitor Communications," *Wall Street Journal*, 22 June 2009, A1.

B. Drastic Measures Directed at Websites

In another development, several Chinese government departments jointly launched a large-scale campaign to crack down on online pornography in early 2009.⁹³ Major web portals and search engines such as Sina, Sohu, Netease, Google, and Baidu were cited for failing to prevent the spread of pornographic content.⁹⁴ Google was singled out for strong condemnation several months later.⁹⁵ The Chinese authorities claimed that as many as 15,000 websites, including 11,000 wireless application protocol (WAP) sites, were shut down or blocked in 2009 because they contained pornographic or illegal content.⁹⁶

More drastic action followed. In December 2009, the China Internet Network Information Center (CNNIC), the body managing the domain name .cn, announced new rules for domain name registration that effectively banned private individuals from registering websites under .cn.⁹⁷ This ban turned out to be short-lived, but a new rule was imposed requiring that private individuals use real names and provide personal details and photographs in their website registration.⁹⁸

C. Policing Mobile Phone Communications to Prevent a Twitter Revolution?

In late 2009, telecommunication companies were required to suspend text-messaging services if customers were found to be transmitting pornographic content.⁹⁹ A detailed plan was announced to curb pornographic content on mobile phones, which continued throughout 2010.¹⁰⁰ Google and Baidu, China's largest search engine, were asked to step up management of online search services using mobile phones. Telecommunication companies had to

⁹³ "China Begins Month-Long Crackdown on Internet Porn," *BBC Monitoring Asia-Pacific—Political*, 5 January 2009.

⁹⁴ *Ibid.*

⁹⁵ M. Chan, "Beijing Singles Out Google in Attack on Pornography; Internet Giant's Links 'Severely Harmed' China's Youth," *South China Morning Post* (Hong Kong), 19 June 2009, 6.

⁹⁶ "China Says over 15,000 Porn Websites Blocked in 2009," *BBC Monitoring Asia-Pacific—Political*, 12 January 2010.

⁹⁷ "Individuals May Get .cn Names Again," *ChinaDaily.com.cn*, 19 January 2010.

⁹⁸ *Ibid.*

⁹⁹ "Crackdown Launched on Cell Phone Porn," *ChinaDaily.com.cn*, 20 November 2009.

¹⁰⁰ MIIT, "Working Plan on the Special Task of Further Combating Obscene and Pornographic Content on Mobile Phones" (Jinyibu shenru zhengzhi shouji yinhui seqing zhuanxiang xingdong gongzuo fangan), 15 December 2009, available at <http://www.miit.gov.cn/n11293472/n11293877/n12945745/12945799.html>.

keep track of WAP gateways and to devise filtering standards for these gateways. No new gateways were allowed in 2010. Real name registration for the purchase of SIM cards was enforced in September 2010.¹⁰¹

The Chinese authorities in late 2010 stressed that the fight against online pornography would be a long-term task; periodic campaigns targeting “harmful content” were transformed into a regular and year-round pursuit.¹⁰² Some, however, doubted the real motive of campaigns against pornography, suggesting that it was political content that the Chinese government was actually after.¹⁰³ A blog-hosting website popular among intellectuals, Bullog, was shut down for failing to remove a large amount of “harmful information” relating to current affairs and politics.¹⁰⁴

D. Real Name Registration

Chinese netizens resisted real name registration, which was widely perceived as an attempt to wipe out net and phone anonymity so as to curb online manhunts and online activism.¹⁰⁵ By mid-2009, however, major portals began requiring all new users to register under their real names before they could post online comments.¹⁰⁶ This was followed by major portals requiring new microblog users to register under their real names in early 2012.¹⁰⁷

¹⁰¹ “Real Name Registration for Mobile Phones Starts from Today,” *Netease Tech News*, 1 September 2010 (in Chinese), available at <http://tech.163.com/special/mobileidentification/>.

¹⁰² “Working Conference Held in Yunnan on Combating Obscene and Pornographic Content Transmitted Online and via Mobile Phones: Liu Yunshan Attended and Addressed,” Xinhua News Agency, 13 December 2010 (in Chinese), available at http://news.southcn.com/z/2010-12/13/content_18404705.htm.

¹⁰³ Most media practitioners and academics with whom the author spoke shared this view.

¹⁰⁴ “Strike Hard Campaign against ‘Vulgar Content’: Intellectual Website Closed Down,” *Ming Pao* (Hong Kong), 10 February 2009, B16 (in Chinese).

¹⁰⁵ “Web of Restrictions,” *ChinaDaily.com.cn*, 4 May 2009, available at <http://www.cdeclips.com/en/opinion/fullstory.html?id=20557>.

¹⁰⁶ J. Ansfield, “China Orders Web Sites to Ask for Users’ Names; New Layer of Surveillance as Beijing Moves against Anonymous Registration,” *International Herald Tribune*, 7 September 2009, 3.

¹⁰⁷ “Four Major Portals Start Practicing Real Name Registration; Big Gifts Handed Out to Real Name Users,” *Chutian Metropolis Daily* (Wuhan, Hubei Province), 17 March 2012 (in Chinese), available at <http://news.cnhubei.com/ctdsb/ctdsbsgk/ctdsb06/201203/t2006091.shtml>.

Apparently, these measures designed by industry operators were not effective,¹⁰⁸ even though some cities introduced local legislation in early 2009 requiring real name registration to regulate online comments.¹⁰⁹ In late 2011, a pilot scheme was launched in Beijing, Shanghai and three other major cities to regulate microblogs, requiring real name registration to open accounts.¹¹⁰

Nationwide legislative efforts followed. The Chinese government announced in June 2012 plans to amend the Measures on Management of Internet Information Services, a major piece of Internet regulation that was 12 years old.¹¹¹ The requirement of real name registration for the provision of online services was included in the draft amendments, thus extending the five-city pilot scheme to the whole country.¹¹² Another important piece of national legislation was enacted in December 2012 to step up data security and privacy in an online environment.¹¹³ Article 6 of the legislation stipulated that network service providers should require users to provide real identity information when applying for Internet access or online content services.

E. Stopping Rumors and Taming Weibo

China imposed stricter control on microblog services in view of political developments both at home and abroad. Overseas, the role of social media was spectacular in 2010 and in the 2011 Arab Spring, particularly in the downfall of Egypt's Mubarak regime. Domestically, the CCP underwent its most severe power struggles in decades, as illustrated by the dramatic events unfolded in 2012 relating to the downfall of Chongqing mayor Bo Xilai, a heavyweight in the conservative camp.¹¹⁴

¹⁰⁸ "A Factual Account of Real Name Registration for SIM Card in Practice: 'No Name' SIM Cards Can Be Purchased Freely," *Chengdu Business Daily* (Chengdu, Sichuan Province), 9 September 2011 (in Chinese), available at <http://news.itxinwen.com/communication/inland/2011/0909/346174.html>.

¹⁰⁹ "Web of Restrictions," *supra* note 105.

¹¹⁰ Provisions on the Regulation of Microblog Developments in Beijing municipality (Beijingshi weiboke fazhan guanli ruogan guiding), 16 December 2011, available at <http://zhengwu.beijing.gov.cn/gzdt/gggs/t1208848.htm>.

¹¹¹ Draft Bill for Public Consultation on Amending the Measures on Management of Internet Information Services (Hulianwang xinxi fuwu guanli banfa [xiudingan zhengqiu yijiangao]), 7 June 2012.

¹¹² *Ibid.*, Article 15.

¹¹³ The Decision of the Standing Committee of the National People's Congress on Strengthening Online Information Protection (Quanguo renmin daibiao dahui changwu weiyuanhui guanyu jiaqiang wangluo xinxi baohu de jue ding), enacted and promulgated on 28 December 2012.

¹¹⁴ See "BBC Monitoring Quotes from China, Taiwan Press, April 12, 2012," *BBC Worldwide Monitoring*, 12 April 2012.

For several days in February 2012, loads of tweets were posted on Weibo concerning rumors that Wang Lijun, Chongqing's deputy mayor and police chief, had sought asylum in the US consulate in Chengdu.¹¹⁵ A few weeks later, on an evening in mid-March 2012, tweets on Weibo spread the news of gunshots and tank movements in Beijing.¹¹⁶ There was no official confirmation of what happened that night, but the Chinese authorities took drastic action to curb rumors on microblogs and other websites. Six men were arrested for spreading rumors of a coup in Beijing, and the Weibo and Tencent microblog services suspended user comments for three days in early April.¹¹⁷ The authorities announced that some 201,000 rumor-related tweets had been deleted within two weeks, and a total of 42 websites were shut down for spreading rumors.¹¹⁸ In early September 2012, more rumors cropped up on the Internet when Xi Jinping, the vice president of China at the time (he became the president in early 2013), failed to turn up at scheduled official functions.¹¹⁹

According to Sina, Weibo registered users reached 536 million in March 2013.¹²⁰ Weibo thus became the largest online public platform for publishing and discussion that had ever existed. The platform was subject to close monitoring like all other websites in China.¹²¹ Labeled as a hotbed of rumors, Weibo introduced a credit system in mid-2012 to curb the spread of harmful and untrue information.¹²² By mid-2013, some 200,000 users lost all their credits, resulting in their accounts being permanently shut down.¹²³ Some

¹¹⁵ K. Zhai, "Internet Buzzes on Fate of Wang Lijun; While State-Run Media Remained Largely Silent about the Alleged Defection Attempt by Chongqing's Controversial Ex-Police Chief and Ally of Rising Political Star Bo Xilai, Mainland Web Users Went Wild," *South China Morning Post* (Hong Kong), 10 February 2012, 8.

¹¹⁶ B. Gertz, "Inside the Ring; Beijing Coup Rumors," *Washington Times*, 22 March 2012, 9.

¹¹⁷ P. Jiao, "Microbloggers Back in Action; Three-Day Suspension of Sina and Tencent Imposed over Coup Rumours Is Lifted, but Users Complain about Infringement of Their Right to Free Speech," *South China Morning Post* (Hong Kong), 4 April 2012, 5.

¹¹⁸ "State Internet Information Office: Shutting Down 42 Websites According to Law for Spreading Rumors," *People's Daily* (Beijing), 13 April 2012 (in Chinese), available at <http://news.sina.com.cn/c/2012-04-13/033524264166.shtml>.

¹¹⁹ "Vanished' Leader Stirs China Turmoil; An Unseen President-in-Waiting and a Sex Game That Led to a Fatal Crash Are the Latest Dramas to Engulf the Ruling Elite," *Sunday Times* (London), 9 September 2012.

¹²⁰ "Sina Reports First Quarter 2013 Financial Results" (in Chinese), 17 May 2013, available at <http://tech2ipo.com/59732>.

¹²¹ This is based on the author's research and observations.

¹²² D. Du, "Credits Deducted for Spreading Rumours; Account Cancelled When Reaching Zero Credit," *Beijing Evening News*, 5 July 2013, A12 (in Chinese).

¹²³ Ibid.

netizens, however, including celebrities with thousands or millions of followers on Weibo, maintained that their accounts were frozen or cancelled simply because the content had upset the authorities.¹²⁴

As of mid-2013, China's microblog services were monopolized by a handful of portals, with Sina and Tencent having the largest number of subscribers.¹²⁵ Some observers noted that China's online censorship in the era of microblogs became far more effective because most netizens used either Sina or Tencent.¹²⁶ It is also noteworthy that these two microblog services were apparently realigning themselves to work more like Facebook than Twitter, focusing on social networking rather than on spreading information and news.¹²⁷

F. Imprisonment and Labor Camps

In addition to threats and harassment, jail sentences and detention in labor camps were deployed to stifle online criticism and political expression.¹²⁸ The prominent critics Liu Xiaobo, Hu Jia and Tan Zuoren were separately convicted of the offence of sedition under Article 105(2) of the Criminal Code in the post-Beijing Olympics years and were given long prison sentences¹²⁹ Article 105(2) of China's Criminal Code prohibits "the use of rumors, defamation or any other means to incite subversion of state power or overthrow of the socialist system."

At the local level, since 2007 and more frequently in 2008 and 2009, some Chinese netizens were jailed for criminal defamation because of their online criticism or exposés of corruption and malpractice by local officials.¹³⁰ Article 246 of the Criminal Code prohibits "use of violence or any

¹²⁴ M. Moore, "China Launches New Crackdown on Internet Celebrities," *The Telegraph* (London), 13 May 2013.

¹²⁵ X. Feng and X. Li, "Tencent Microblog Users Reach 540 Million; Daily Active Users More Than 100 Million," *Yangcheng Evening News* (Guangzhou), 21 January 2013 (in Chinese), available at <http://tech.qq.com/a/20130121/000094.htm>.

¹²⁶ Briefings given to the author by senior executives of websites.

¹²⁷ An observation made by the author, and agreed with by many of the media practitioners interviewed.

¹²⁸ M. Earp, *Throttling Dissent: China's New Leaders Refine Internet Control* (Freedom House, July 2013), 32–37, available at http://www.freedomhouse.org/sites/default/files/resources/Throttling%20Dissent_FOTN%202013_China_0.pdf.

¹²⁹ "China: EU Should Demand Concrete Progress on Rights in Dialogue," Human Rights Watch, 28 June 2010, available at <http://www.hrw.org/news/2010/06/25/china-eu-should-demand-concrete-progress-rights-dialogue>.

¹³⁰ For a detailed account, see M. Yan, "Criminal Defamation in New Media Environment: The Case of the People's Republic of China," *International Journal of Communication Law and Policy* 14 (2011): 1.

other means to insult publicly another person or to fabricate facts to defame another person." The offence is mainly reserved for private prosecution by victims of defamation, and public prosecutions should only be instigated "in cases which seriously endanger social order or national interest."¹³¹ Public prosecutions of several netizens for criminal defamation attracted huge concern nationwide, and some of these netizens were paid state compensation for unlawful detention.¹³² In late 2012 and soon after the downfall of Mayor Bo Xilai, it was revealed that the Chongqing authorities during Bo's reign regularly sent netizens to labor camps without court trial for their online criticism or postings.¹³³

V. Challenging China's Internet control

The US government and Congress, some of its Western allies and many NGOs around the world made continued efforts to challenge China's strict Internet controls. In early 2010, Google ignited a new round of heated debate over China's Internet regulation.¹³⁴ Google complained of security attacks and surveillance originating from China and the country's further limiting of online expression. Google made a significant move on 22 March 2010, by no longer censoring its Google.cn search services.¹³⁵ To prevent Google from effectively going dark in China, the company later provided a landing page on Google.cn where users could have direct access to only three kinds of Google services, namely, music, translation and shopping. Users from mainland China wanting to conduct Web searches could go to Google.com.hk by clicking a link on the landing page. The Chinese authorities subsequently renewed Google's ICP license, and the Google.cn website survived.¹³⁶ Google.com.hk, blocked intermittently, was not always accessible in mainland China.¹³⁷ Unlike Facebook and YouTube, however, Google escaped being totally blocked.

¹³¹ See Criminal Code, Article 246, second paragraph.

¹³² T. Branigan, "Chinese Censorship: In Search of a Voice," *The Guardian* (London), 25 March 2010, 24.

¹³³ See "Red Generation Descendant Sent to Labor Camp" and "Ren Jianyu: A Village Official Sent to Labor Camp," *Southern People Weekly* (Guangzhou), 9 September 2012 (in Chinese), available at <http://www.infzm.com/content/80644> and <http://www.infzm.com/content/80645>.

¹³⁴ D. Drummond, "A New Approach to China," 12 January 2010, available at <http://googleblog.blogspot.com/2010/01/new-approach-to-china.html>.

¹³⁵ Ibid.

¹³⁶ M. Liedtke, "Google Wins Permission to Keep Website in China," Associated Press, 9 July 2010.

¹³⁷ C. Miller, "Google Search Engine Is Blocked in China," *New York Times*, 29 July 2010, available at <http://bits.blogs.nytimes.com/2010/07/29/google-search-engine->

Throughout the Google row, the Chinese authorities demonstrated a high degree of restraint and pragmatism.¹³⁸ This might be due to the lack of home-grown equivalents as powerful as Google in searching English text, which would make a complete blocking of Google a major inconvenience to China's expatriate community.¹³⁹ Nonetheless, China issued a "White Paper on China's Internet" for the first time in June 2010, reiterating its sovereignty over Internet regulation and emphasizing that foreign companies had to abide by Chinese laws and regulations when conducting their business in China.¹⁴⁰ Freedom of expression is not a purely domestic issue, especially when the Internet is involved. China's increased control over the Internet after the 2008 Beijing Olympics, the Green Dam initiative in mid-2009, and the Google row all brought home a crucial question: were existing Chinese legislation and measures regulating the Internet compatible with international law? Or, alternatively, could international law have a real impact on China's Internet policy?

A. Compatible with Universal Human Rights Norms?

China's constitution guarantees citizens' freedom of speech and publication (Article 35), freedom and privacy of correspondence (Article 40) and the right to criticize and make suggestions to any state organ or functionary (Article 41). But China's constitution also specifies numerous duties of citizens. It states that in exercising their freedoms and rights, citizens may not infringe on the interests of the state, of society and of the collective (Article 51); that citizens must safeguard the unity of the country and the unity of all its nationalities (Article 52) and must keep state secrets (Article 53), must safeguard the security, honor and interests of the motherland, and must not commit acts detrimental to those objectives (Article 54).

Have the above-mentioned constitutional rights simply been eliminated under the heavy burden imposed by the duties? This is where international law and universal human rights norms come into play. Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the freedom to seek, receive and impart information and ideas regardless of frontiers. Article 19(3) of the ICCPR permits member states to impose restrictions on freedom of expression, but the restrictive measures must

is-blocked-in-china/?th&emc=th.

¹³⁸ "China: Information Office Issues Statement on Google's Withdrawal," *BBC Monitoring Asia-Pacific-Political*, 24 March 2010.

¹³⁹ This is an observation made by the author. Meanwhile, both the *People's Daily* and the Xinhua News Agency launched search engine businesses in mid-2010.

¹⁴⁰ The full text of the White Paper in English is available at http://www.china.org.cn/government/whitepaper/node_7093508.htm.

be provided by law, serve a legitimate purpose, and be proportionate to the purposes pursued. It has long been acknowledged that the principle of proportionality is the key to any restrictions imposed in accordance with Article 19(3).¹⁴¹ The General Comments on Article 19 issued by the United Nations Human Rights Committee, the body overseeing the implementation of the ICCPR, stress that when certain restrictions are imposed on the exercise of freedom of expression, these may not put in jeopardy the right itself.¹⁴² The issue of Internet access was also addressed in the 2011 annual report prepared by the UN Special Rapporteur on Freedom of Expression.¹⁴³ When blocking online content, the report says, states must provide full details on why it is necessary to do so, and what to block has to be determined by a competent judicial body or a body independent of political, commercial or other unwarranted influence to ensure that no censorship is involved.¹⁴⁴ However, China only signed the ICCPR in 1998, and, as of mid-2013, it had yet to ratify the Covenant.

During the Google row, US Secretary of State Hillary Clinton indicated that the United States would bring up the issue of Internet freedom at the UN Human Rights Council.¹⁴⁵ Upon its formation in 2006, the council introduced universal periodic reviews of the human rights of UN member states. China's situation was examined under this procedure for the first time in 2009. China's media policy and Internet regulation remained intact despite the review. On that occasion, the Chinese delegation told the council that China's laws provided complete guarantees of freedom of speech and expression and that there was no media censorship in China.¹⁴⁶ The Chinese delegation also addressed the issue of Internet regulation, and reiterated that the relevant Chinese legal provisions were in conformity with the ICCPR.¹⁴⁷

¹⁴¹ See M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd rev. ed. (Kehl: N. P. Engel, 2005), 460.

¹⁴² UN Human Rights Committee, ICCPR General Comment 34, para. 21 (2011), available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

¹⁴³ UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Report of the Special Rapporteur to the General Assembly on the Right to Freedom of Opinion and Expression Exercised through the Internet, U.N. Doc. A/66/290 (2011), available at <http://www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf>.

¹⁴⁴ *Ibid.*, para. 82.

¹⁴⁵ R. Smith, *Texts and Materials on International Human Rights*, 2nd ed. (London: Routledge, 2010), 182.

¹⁴⁶ UN Human Rights Council, Report of the Working Group on the Universal Periodic Review, U.N. Doc. A/HRC/11/25, para. 71 (2009).

¹⁴⁷ *Ibid.*

B. Strict Internet Control: A Kind of Trade Barrier?

Google published a white paper in late 2010 portraying Internet censorship as a kind of trade barrier, urging the US government and its allies to take steps to (a) highlight as unfair trade barriers those practices by governments that restrict or disrupt online information services; (b) take appropriate action where government restrictions on the free flow of online information violated existing international trade rules; and (c) establish new international trade rules to facilitate the free flow of online information.¹⁴⁸ Earlier on, the US government also indicated that it would examine the possibility of complaining to the WTO regarding China's Internet regulation.¹⁴⁹ In recent years, the United States won three victories under the WTO aegis, namely, (a) the *Foreign Financial Information Suppliers* case; (b) the *Intellectual Property Right* case; and (c) the *Media Imports* case, all three of which were directly or indirectly related to China's censorship practices.¹⁵⁰ The WTO treaties govern international trade practices, the major purpose of which is to promote free trade, not free speech. But an obvious question is: Could strict control of Internet content, including blocking or filtering online content from outside China, or requiring Google and other ICPs to filter online content, be considered a violation of the commitments China made upon its accession to the WTO?

Tim Wu examined the issue of Internet censorship and the WTO. He observed that while the Yahoo presumption—that the burden lay with Internet companies to adapt to national legal systems—was still generally true, the tendency in WTO jurisprudence was to put the burden on national governments to justify Internet blocking.¹⁵¹ As the GATS was written under a

¹⁴⁸ B. Boorstin, "Promoting Free Trade for the Internet Economy," 15 November 2010, available at <http://googlepublicpolicy.blogspot.com/2010/11/promoting-free-trade-for-Internet.html>. Bob Boorstin was the director of public policy at Google Inc. at the time. The title of the white paper is "Enabling Trade in the Era of Information Technologies: Breaking Down Barriers to the Free Flow of Information."

¹⁴⁹ D. Palmer, "US Weighing China Internet Censorship Case," Reuters, 10 March 2010, <http://www.reuters.com/article/idUSTRE6284YG20100310>.

¹⁵⁰ WTO, "Dispute Settlement 373: China—Measures Affecting Financial Information Services and Foreign Financial Information Suppliers," available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds373_e.htm; WTO, "Dispute Settlement 362: China—Measures Affecting the Protection and Enforcement of Intellectual Property Right," available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm; and WTO, "Dispute Settlement 363, China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products," available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm.

¹⁵¹ T. Wu, "Symposium: Legal Implications of a Rising China: The World Trade Law of Censorship and Internet Filtering," *Chicago Journal of International Law* 7 (2006): 263, 265.

pre-Internet concept of “telecommunications services,” it was far from certain what specific commitments China had made in relation to Internet services. If China did commit to opening up the sector of search engines, then blocking Internet flow would apparently violate market access commitments in view of the *Online Gambling* ruling.¹⁵² Wu added that the implications were less clear with regard to mandatory filtering by ICPs, because Article XVII of the GATS, which governs market access, only banned limitations such as the number of outlets and employees. The provision did not suggest that a country could not limit what a service did pursuant to local laws.

In light of the WTO ruling against China in the *Media Imports* case, Brian Hindley and Hosuk Lee-Makiyama examined the possibility of bringing a case before the WTO challenging online censorship as the most important nontariff barrier to the provision of online services.¹⁵³ However, they noted two immediate shortcomings—it gave rise to a debate over sovereignty and the ever-expanding scope of trade-related issues under the WTO, and members found to be in violation of WTO rules might decide to continue their practices and accept trade retaliation. The two researchers considered that a WTO panel might rule that the permanent blocking of overseas search engines, video- and photo-sharing applications and other Internet services was indeed inconsistent with GATS provisions, even given moral and public security exceptions. The WTO Appellate Body introduced a two-tier test in the *Online Gambling* case requiring that a country adopting restrictive measures on trade services must (a) show that the measures are necessary for public morals and order or for national security, and (b) pursue a less trade-restrictive measure to obtain its objectives if one is reasonably available, taking into account the interest being pursued and the desired level of protection.¹⁵⁴ These WTO requirements on the necessity and proportionality of restrictive measures on trade services are very similar to those stipulated in the ICCPR regarding restrictions on freedom of expression.

In contrast to its attitude toward the ratification of the ICCPR, China zealously pursued its accession to the WTO, succeeding in 2001. The WTO accession had a huge impact on China and its media policy, particularly in relation to Internet regulation. American Internet giants such as Yahoo! and Google were able to operate in the Chinese market because of the country’s WTO commitments to value-added telecommunications services. China also liberalized its Internet regulation so as to prepare for foreign competition. ICPs were allowed

¹⁵² See WTO, “US: Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R,” for details and rulings of the case.

¹⁵³ B. Hindley and H. Lee-Makiyama., “Protectionism Online: Internet Censorship and International Trade Law,” European Centre for International Political Economy Working Paper No. 12/2009 (2009).

¹⁵⁴ WTO, *supra* note 152, paras. 309–11.

to be owned and operated by private entities, representing a major departure from CCP media policies. Small private business ventures such as Sina, Netease, and Sohu were tolerated and eventually became major web portals. Compared with traditional media, ICPs enjoyed a greater degree of freedom so long as they abided by the basic rules and performed the role of collaborators. Traditional media also benefited hugely. Newspapers from the provinces and big cities, previously confined geographically, became de facto national media through web-site building. As their influence grew, competition among them increased. The need for constant updating of online news and the reporting of breaking news also made many Chinese journalists and print media more professional.

A closer examination provides a less optimistic picture, however. In its WTO commitment schedules, China specifically required that “all international telecommunications services shall go through gateways established with the approval of China’s telecommunications authorities.”¹⁵⁵ In other words, China fiercely guarded its Great Firewall upon joining the WTO. Also, as mentioned, overseas companies operating in the China market were required to perform the role of Internet content censors.

It is difficult to predict whether WTO rules will eventually have a greater impact on China’s Internet regulation than Article 19 of the ICCPR. There are several issues and factors pending. China’s legislature amended the copyright law in early 2010 after the WTO ruling in the *Intellectual Property Right* case.¹⁵⁶ It was to plug a loophole withholding copyright protection from any overseas publications not permitted to be circulated in China, but the revised text reflected China’s insistence on its sovereignty over the regulation of publications circulated within the country.

In March 2011, the Chinese government implemented several pieces of amended legislation after the WTO rulings in the *Media Imports* case.¹⁵⁷ State-owned enterprises would no longer enjoy a monopoly over the content review and importation of books, newspapers, magazines and audiovisual products.¹⁵⁸ However, China was reluctant to give up much of its censorship

¹⁵⁵ See sector-specific commitments of China, *supra* note 52.

¹⁵⁶ “China Reports on Implementation in Intellectual Property Case,” *WTO 2010 News Items*, 17 March 2001, available at http://www.wto.org/english/news_e/news10_e/dsb_19mar10_e.htm.

¹⁵⁷ On 19 March 2011, the Chinese authorities implemented two pieces of amended legislation: (a) Regulations on the Management of Publishing (chuban guanli tiaoli), State Council Decree No. 343 (2011); and (b) Regulations on the Management of Audiovisual Products (Yinxiang zhipin guanli tiaoli), State Council Decree No. 341 (2011). On 25 March 2011, another amended regulation, Measures on the Management of Subscriptions to Imported Publications (Tinghu tinggou jinkou chubanwu guanli banfa), GAPP Decree No. 51 (2011), was also implemented.

¹⁵⁸ This monopoly was stipulated in the Regulations on the Management of Publishing (Chuban guanli tiaoli) (2002).

power. Importation business licenses would only be granted to entities that GAPP found to be properly owned and supervised.¹⁵⁹ These licensed entities were still required to conduct content review of media imports.¹⁶⁰ In addition, imported audiovisual products had to be submitted to GAPP for content review before they could be put up for sale, etc.¹⁶¹

Campaigns against pornographic websites and mobile text messages were supposedly targeted all websites in China. Although singled out for criticism, Google was not subjected to any obvious discriminatory treatment. It was therefore difficult to prove that China had violated GATS provisions. The Chinese authorities placed great emphasis on the protection of public morals and children as a rationale for controlling the Internet. This appealed to parents and helped China rely on the GATS exemption for protecting public morals if complaints were eventually brought before the WTO. In sum, the Chinese government did not give up its strict control over media access and content, whether in relation to the Internet or other media, despite its accession to the WTO.

VI. Into the Future?

Many predicted that China's entry into the WTO and hosting of the 2008 Beijing Olympics would speedily transform the country and enlarge the scope of freedom of expression.¹⁶² These expectations did not materialize, however. From late 2008 onwards, China adopted harsher regulatory and control measures on the country's Internet. China was certainly not the only country to have stepped up Internet regulation. The increasing magnitude of problems associated with new media, such as computer security, online pornography, loss of privacy, online bullying, and infringement of copyright, had rallied greater support for tighter control over the Internet. Western governments should take care to abide by the relevant ICCPR provisions and not set a bad example for China and some other countries by overregulating the Internet.

Arguably, regulatory responses by the Chinese government since late 2008 could wipe out any expanded scope for freedom of expression enjoyed by the Chinese people and eliminate most of the benefits, whether spiritual or materialistic, so far accrued by new media. On a pessimistic note, Chinese

¹⁵⁹ Regulations on the Management of Publishing (Chuban guanli tiaoli), State Council Decree No. 343 (2011), Articles 41 and 42.

¹⁶⁰ Ibid., Article 45.

¹⁶¹ Regulations on the Management of Audiovisual Products (Yinxiang zhipin guanli tiaoli), State Council Decree No. 341 (2011), Article 28.

¹⁶² M. Price and D. Dayan, *Owning the Olympics: Narratives of the New China* (Ann Arbor: University of Michigan Press, 2008).

netizens certainly cannot enjoy the same type of online freedom of expression commonly found in the West so long as the Chinese government maintains one-party rule and insists on a regime of command-and-control over China's media. Moreover, despite the growth of online activism, no sustainable online civil society was in sight in China. This online picture mirrored that of the real world.

China had become a world superpower, but domestically it faced enormous difficulties in tackling chronic problems such as corruption, localism, and income disparity. It was far from certain what would happen in China's politics and how new media would play a role in fostering change. Indeed, one day could be too long in Chinese politics, as reflected in the "rumors" and dramas unfolding throughout 2012 concerning power struggles among China's top leaders. The future scope of freedom of expression was also unknown. Freedom was apparently further restricted in early 2013, as indicated by the *Southern Weekend* incident and an order issued to make seven taboo topics, press freedom being one, off-limits in Chinese universities.¹⁶³ On the other hand, special zones of free Internet access were to be allowed in mainland China, namely, on the University of Macau's new campus and in Qianhai, a financial center under construction modeled after Hong Kong's central district.¹⁶⁴

Nevertheless, given the enormous impact of WTO accession on China and Chinese people's increasing contact with the outside world, both in reality and online, demands for change and opening up will continue to grow. These, coupled with technological advances and the zealous efforts of many Chinese netizens and media workers, encourage an optimistic view of the long-term prospects for freedom of expression in China.

To sum up, the China case study shows on the one hand that Internet policy, like broadcasting policy, remains a largely sovereign issue, but on the other hand that it can be beneficial for nations to reach a consensus over the importance of not turning the Internet into a closed space, and of not killing the generativity of the new medium.

¹⁶³ "Xi and China's Seven Taboos," *Deutsche Welle World*, 10 June 2013.

¹⁶⁴ Lau and Yang, "Underwater Tunnel to Cross-Border College in China," *supra* note 74.

Eavesdropping on the Freedom of Expression in India

SUNIL ABRAHAM¹

I. Introduction

Today, freedom of expression in India is heavily influenced by policies and practices around intermediary liability and surveillance. Instances like the leaked interceptions in connection with the multi-billion dollar 2G spectrum scam,² the National Technical Research Organization's (NTRO) pervasive unauthorized wiretapping of 750,000 phone lines,³ the 2011 Intermediaries Guidelines Rules, the Cyber Café Guidelines Rules 2011, the Central Monitoring System, and Telecom Minister Kapil Sibal's move to censor Internet content before it is published online,⁴ give rise to many important questions about intermediary liability, surveillance, and the freedom of expression in India.

This chapter explores the chilling effect that the Indian government's steps to regulate and monitor Internet content and communications has had on free speech in India. To do this, I examine relevant policies and practices surrounding the freedom of expression and privacy. The research in this chapter

¹ The author thanks Elonnai Hickok for her support.

² "Ratan Tata Files Petition in SC on Nira Radia Tapes," *Times of India*, 29 November 2010, <http://timesofindia.indiatimes.com/business/india-business/Ratan-Tata-files-petition-in-SC-on-Nira-Radia-tapes/articleshow/7008779.cms>.

³ "Did NTRO Tap Phones?," *Times of India*, 1 August 2011, <http://www.timesnow.tv/Did-NTRO-tap-phones/articleshow/4380345.cms>.

⁴ "Kapil Sibal under Attack: 'We Like Our Freedom and We Shall Have It,'" *Times of India*, 7 December 2011, <http://timesofindia.indiatimes.com/tech/social-media/Kapil-Sibal-under-attack-We-like-our-freedom-and-we-shall-have-it/article-show/11020982.cms>.

comes from the results of a 2011 policy sting operation that tested the impact of the Intermediary Liability Rules, an analysis of legislation, and an examination of news reports—as there is scant scholarship and official documentation about Indian security organizations and their affairs. To the extent of the bias in the underlying reporting, that bias might be carried forward here.

In India the freedom of expression is upheld by Article 19 of the Constitution of India as a fundamental right. There are only eight limits on this right: security of the state, friendly relations with foreign states, public order, decency and morality, contempt of court, defamation, incitement to an offence, and protection of the sovereignty and integrity of India.⁵ In light of the growing use and widespread impact of the Internet, provisions impacting freedom of expression have appeared in other legislation and policy related to intermediary liability and surveillance.

II. Intermediary Liability Law and Policy

Law and policy in India regulating intermediaries almost always contains provisions that broadly define speech that is prohibited on the Internet and require intermediaries to (1) monitor, and remove when necessary, content that is put online; (2) retain logs of removed content and user information/browsing history; (3) limit anonymous speech; and (4) allow access to retained content when requested by law enforcement. These requirements negatively impact freedom of expression by limiting speech that is permitted and removing the option of anonymous speech, monitoring/retaining all/unspecified speech, and using it for purposes without the knowledge or consent of the individual.

A. Intermediaries Guidelines Rules 2011

In April 2011 the government of India notified the Intermediaries Guidelines Rules under Section 79 of the Information Technology Act 2000.⁶ The Rules mandate that intermediaries implement a Terms of Service (ToS) that describe what content is and is not allowed to be posted, and holds intermediaries liable if they do not act upon take-down notices that bring to their attention content that is in violation of the ToS.

⁵ The Constitution of India 1949, Article 19(1)(a), <http://indiankanoon.org/doc/1142233/>.

⁶ The Intermediaries Guidelines Rules 2011, http://www.mit.gov.in/sites/upload_files/dit/files/GSR314E_10511%281%29.pdf.

Under the Rules, intermediaries are also required to inform users that in the case of noncompliance, the intermediary has the right to discontinue the access and usage rights of the user, and in addition will remove noncompliant content.⁷ The rule lists 30 broad, and often vague, reasons for which content may be considered “noncompliant” and worthy of being removed.⁸

In order to enforce these conditions, the Rules have created a system of private censorship with an embedded monitoring regime, in which affected individuals can issue take-down notices “in writing or through email signed with an electronic signature” to the intermediary. If a notice is served, the intermediary must respond within 36 hours of receiving the notice. Any content removed by the intermediary upon notice and associated logs must be preserved for a period of 90 days for the purposes of investigation.⁹ When requested in writing, intermediaries are required to provide any authorized governmental agency with information for the purposes of “verification of identity, prevention, detection, investigation, prosecution, cyber security incidents, and punishment for any law for the time being in force.”¹⁰

In many ways, the Rules go beyond the constitutional limits on free speech in India. This is particularly true because the Rules entrust private intermediaries, usually corporations, with the role of censoring content, while giving any unaffected individual the right to ask for censorship. At the same time, the Rules allow for potential monitoring of content by the government by providing authorized agencies access to removed content through provisions that set a lower standard for access than traditional access provisions in the Criminal Procedure Code. Thus, despite statements from the government that the Rules do not violate freedom of expression, the international and national press have criticized the provisions for encouraging the abuse of

⁷ Ibid., Sec. 3(5).

⁸ This includes: “information that belongs to another person and to which the user does not have any right to, is grossly harmful, harassing, blasphemous defamatory, obscene, pornographic, paedophilic, libellous, invasive of another’s privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever, harm minors in any way, infringes any patent, trademark, copyright or other proprietary rights, violates any law for the time being in force, deceives or misleads the addressee about the origin of such messages or communicates any information which is grossly offensive or menacing in nature, impersonate another person, contains software viruses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any computer resource, threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states, or public order or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting to any other nation” (Intermediary Liability Rules 2011, Sec. 3(2)(a-i)).

⁹ Ibid., Sec. 3(4).

¹⁰ Ibid., Sec. 3(7).

take-down notices and summary removal of content without adherence to the principles of natural justice.¹¹

B. Cyber Café Guidelines 2011

In addition to the Intermediaries Guidelines, in 2011 the Indian government notified the Guidelines for Cyber Cafés under the Information Technology Act 2000 (ITA).¹² Among other things, these Guidelines require cyber cafés to maintain the following records for at least one year:

1. A scanned or photocopy record of user identification documents.¹³
2. A log register containing the name, address, gender, contact number, type and detail of identification document, date, computer terminal identification, log in time, and log out time.¹⁴ The log register should also contain date-wise details on the usage of a computer resource.¹⁵
3. Log records for each access or login by any user of the history of web-sites accessed and the logs of proxy servers installed at cyber cafés.¹⁶

These records, along with any document, register, or other necessary information must be provided to an officer authorized by the registration agency for cyber cafes.¹⁷ In effect, these requirements take away cyber café user's ability to browse anonymously without having their online activity monitored, stored, and retained.

C. Registration of .in Domain Names and Know Your Customer (KYC) Requirements

An individual's ability to use the Internet anonymously is also limited by the requirements for registration of a .in domain name. Unlike many country

¹¹ For example, see R. Bailly, "Censoring the Internet: The New Intermediary Guidelines," *Economic Political Weekly*, 4 February 2012, <http://www.indianet.nl/pdf/epw120204.pdf>; H. Timmons, "India Asks Google, Facebook to Screen User Content," *New York Times*, 5 December 2011, <http://india.blogs.nytimes.com/2011/12/05/india-asks-google-facebook-others-to-screen-user-content/>.

¹² Guidelines for Cyber Café Rules 2011, http://mit.gov.in/sites/upload_files/dit/files/GSR315E_10511%281%29.pdf.

¹³ *Ibid.*, Sec. 4(2).

¹⁴ *Ibid.*, Sec. 5(2).

¹⁵ *Ibid.*, Sec. 5(3).

¹⁶ *Ibid.*, Sec. 5(4).

¹⁷ *Ibid.*, Sec. (7).

domains, .in, which is regulated by the National Internet Exchange, does not allow for anonymous registration. For example, the Terms and Conditions for Registrants require registering individuals to provide contact details including their full name, postal address, email address, voice and telephone number, and fax number.¹⁸ Further limiting anonymous speech, the government of India requires individuals purchasing SIM cards and installing broadband connections to provide full and accurate details of identification.¹⁹ While open and unsecured Wi-Fi is illegal, and individuals using public Wi-Fi in India must verify themselves by either providing a copy of their photo identity, or through login and password via SMS on their phone. In both cases the provider of the public Wi-Fi must store the copy of identity or mobile number for a period of one year.²⁰

III. Surveillance Law and Policy

Alongside the policies directly regulating intermediaries, another limiting factor to the freedom of expression in India is the pervasive state surveillance regime deployed by the Indian government. Though state surveillance most directly infringes on an individual's right to privacy, surveillance indirectly impacts the freedom of expression, as it limits an individual's perception that they can express themselves freely. Thus, state surveillance negatively impacts the freedom of expression to the extent that it limits an individual in their ability to, and the security with which they freely share and exchange ideas with others—both in and outside of India.²¹

A. Interception Law

There are two important statutes in India that permit the interception of communications between individuals: the Indian Telegraph Act, 1885 (TA), and the Information Technology Act 2000 (ITA). These statutes reproduce simi-

¹⁸ Terms and Conditions for Registrants, Points 1 and 3, http://www.registry.in/system/files/Terms_and_Conditions_for_Registrants_1.pdf.

¹⁹ Section 41.14, Unified Access Service License, <http://www.auspi.in/policies/UASL.pdf>.

²⁰ Department of Telecommunications, Instructions under the Internet Service License Regarding Provision of Wi-Fi Internet Service under Delicensed Frequency Band, 23 March 2009, Section I(b)(ii), http://www.dot.gov.in/sites/default/files/Wi-%20fi%20Direction%20to%20ISP%2023%20Feb%2009_5.pdf.

²¹ In the Reporters without Borders report "Internet Enemies 2012: Countries under Surveillance—Eritrea," it was found that the majority of Eritreans reverted to self-censorship because of the surveillance and atmosphere of terror that Dictator Isaias Afewerki had imposed, <http://www.unhcr.org/refworld/country,,ANNUALREPORT,ERI,,4fba1def1b,0.html>.

lar restrictions as those applied to the freedom of expression. Under the TA interception is allowed in six circumstances:

1. In the interests of sovereignty
2. Integrity
3. Security
4. Friendly relations with foreign states
5. Public order
6. Preventing incitement to the commission of an offense

These restrictions are allowed to be used under the preconditions that there is a public emergency or in the interest of public safety.²² Though the ITA replicates the same grounds for interception, it also allows for interception in two additional circumstances²³—for preventing the incitement to the commission of any cognizable offence relating to the above to for investigation of any offence. Additionally, the ITA, unlike the TA, does not require that public emergency or public safety be preconditions for interception.²⁴

Though the right to privacy, unlike the freedom of expression, is not explicitly guaranteed by the Constitution of India, the courts in India have consistently read this right into the fundamental right to life and personal liberty,²⁵ specifically in the context of interception. For example, in *PUCL v. Union of India*²⁶ the Honorable Court maintained that interception is an infraction of the constitutionally guaranteed right to life and personal liberty unless it is authorized by the legally established procedure established. As directed by the Honorable Court, on 1 March 2007, the central government issued procedural safeguards for interception as rules under the TA.²⁷ Among other things, the Rules established: the Secretary to the Government of India in the Ministry of Home Affairs and the Secretary to the State Government of the Home Department as the competent authorities

²² Telegraph Act, 1885, Section 5(2).

²³ “For preventing the incitement to the commission of any cognizable offence relating to the above or for investigation of any offence.”

²⁴ Information Technology Act, 2000, Section 69.

²⁵ *R. Rajagopal v. State of T.N.*, <http://indiankanoon.org/doc/501107/>; and summarized in *Naz Foundation v. Government of Delhi*, W.P. (C) No. 7455/2001 (2009), http://www.nazindia.org/judgement_377.pdf.

²⁶ This has been the only case to challenge Section 5(2) of the Telegraph Act (People’s Union for Civil Liberties, “PUCL PIL Challenging Validity of a Section in the Telegraph Act, 1885,” People’s Union for Civil Liberties website, December 2008, <http://www.pucl.org/Topics/Law/2009/telegraph-act.html>).

²⁷ *Ibid.*, Indian Telegraph Rules, 1951, as most recently amended in 2007 under Rule 419A, <http://www.dot.gov.in/Acts/English.pdf>.

for approving interception requests,²⁸ a review committee for ensuring that interception orders are in compliance with the Act,²⁹ and a chain of custody for interception orders and collected material for both service providers and security agencies.³⁰

Under the ITA,³¹ Section 69 of the Act governs interception of all information transmitted through any computer resource. In 2009, the Information Technology (Procedure and Safeguards for Interception, Monitoring, and Decryption of Interception) Rules were notified.³² These Rules, among other things, allow for the real-time monitoring and interception of messages in transit or in storage,³³ require intermediaries to provide “in house” facilities and assistance for intelligence agencies to conduct monitoring,³⁴ require decryption key holders to disclose decryption keys³⁵ and provide decryption assistance, and holds intermediaries liable to both imprisonment and fine for noncompliance.³⁶ Also in 2009 under Section 69B of the ITA, the Information Technology (Procedure and Safeguard for Monitoring and Collecting Traffic Data or Information) Rules were notified. These Rules enable the government to collect and monitor traffic data upon direction from the Secretary to the government of India in the Department of Information Technology for the protection of cyber security, identification, and prevention of the spread of computer viruses.³⁷

Stored information (data at rest) held by service providers can also be accessed via Sections 91 and 92 of the Code of Criminal Procedure (CrPc). If access is sought through Section 91 of the CrPc, an order from an officer in charge of a police station is needed. If access is sought through Section 92, a magistrate, executive or judicial, or any Commissioner of Police, or District

²⁸ Section 2(1).

²⁹ Section 2(17).

³⁰ Section 2(7–15).

³¹ The Information Technology Act 2008, <http://www.cyberlaws.net/itamendments/IT%20ACT%20AMENDMENTS.PDF>.

³² “Information Technology (Procedure and Safeguards for Interception, Monitoring, and Decryption of Interception) Rules Interception, Monitoring, and Decryption Rules,” <http://bsu.bih.nic.in/%28S%280yao2aqcn3lpmoytiterkk55%29%29/static/downloads/itact/it-procedure-interception-monitoring-decryption-rules-2009.pdf>.

³³ *Ibid.*, Sec. 4.

³⁴ *Ibid.*, Sec. 13.

³⁵ *Ibid.*, Sec. 17.

³⁶ *Ibid.*, Sec. 25(5).

³⁷ “Information Technology (Procedure and Safeguard for Monitoring and Collecting Traffic Data or Information) Rules, 2009,” <http://cis-india.org/internet-governance/resources/it-procedure-and-safeguard-for-monitoring-and-collecting-traffic-data-or-information-rules-2009>.

Superintendent can pass an initial order for access, but a court order is needed for further investigation.³⁸

B. Interception Policy

In India, the Internet Services License Agreement and the Unified Access Services Licence Agreement, which are established under the Indian Telegraph Act, 1885, govern the activities of telecommunication operators and Internet service providers (ISPs).³⁹ According to the agreements, the government is afforded extensive access to communication data held by ISPs. For example, the government has the right to inspect/monitor any system of the service provider, and to require service providers to install specific equipment on their networks. Service providers are also responsible for the provision of interception facilities, and must provide location data and CDRs when requested. Furthermore, service providers must make available a list of all subscribers to its services on a password-protected website for easy access by government authorities. The licenses also specify that service providers cannot employ bulk encryption or encryption over 40 bits.⁴⁰ In light of these expansive powers, it is important to note that because the ISP agreements refer back to the provisions of the Telegraph Act, the powers found under the license technically cannot legally be wider than the powers granted under the Act itself.

Broadly, when compared with international policies, both the policy/legislation regulating intermediaries and the policy/legislation surrounding state surveillance lack critical safeguards such as: transparency of procedure, notification, redress, and judicial oversight. These gaps in the Indian regime have resulted in the implementation of policy without adequate legislative and judicial checks, thus allowing the government significant rights to curtail free speech.

IV. Chilling Effects of Intermediary Liability Policy

A. Governmental Content Removal Requests

In India there is little transparency as to the extent and scale of government-initiated surveillance and censorship by the government, thus the extent of

³⁸ The Code of Criminal Procedure, 1973, Sections 91 and 92, <http://www.vakilno1.com/bareacts/CrPc/s91.htm>.

³⁹ License Agreement for Internet Services, <http://www.dot.gov.in/isp/Internet-licence-dated%2016-10-2007.pdf>; Unified Access Service License, <http://www.auspi.in/policies/UASL.pdf>.

⁴⁰ Ibid ISP License, Sec. 2.2, Sec. 30-35; UASL License: Sec. 32, Sec. 37-42.

these activities via intermediaries is unclear. One data point that brings some light to the issue is the Google Transparency Report. According to the report, over a span of six months in 2011, there were 68 governmental requests for content removal and 360 requests for items to be removed. Of these, 51% of requests were fully or partially complied with.⁴¹ In India the trend for removal requests and subsequent compliance has been increasing. For example, in comparison with 2011, in 2010 the government issued 67 content removal requests and 282 item removal requests. Of these, 22% were fully or partially complied with.⁴² Between July and December 2012 the total number of content removal requests was 2,944.⁴³ The 2013 Google Transparency Report also stated “The number of content removal requests we received increased by 90% compared to the previous reporting period.”⁴⁴

B. Chilling Effects on Free Expression on the Internet Report

In order to gain a clearer picture of how censorship happens through intermediaries, in the summer of 2011, Rishabh Dara, a Google Fellow with the Centre for Internet & Society, conducted a study with the objective of determining whether the criteria, procedure, and safeguards of the Rules impacted free expression. The study demonstrates that the Rules have had a chilling effect on the freedom of expression in India.⁴⁵ Furthermore, the study shows that the poorly designed intermediary liability provision had the following shortcomings: insufficient immunity for the intermediary (for example, treating a multinational corporation and an individual blogger similarly), unconstitutional limits on free speech, the use of undefined and unclear terminology, the lack of safeguards and penalties to prevent abuse of the take-down system, lack of transparency (the general public is not informed and nor is the person being censored), and no clear procedure of redress for those wrongfully censored.⁴⁶

During the study, take-down notices were issued to seven different intermediaries. Of the seven, six intermediaries removed content that was

⁴¹ Google Transparency Report, Removal Requests, 2011, <http://www.google.com/transparencyreport/removals/government/IN/?p=2011-06>.

⁴² Google Transparency Report, Removal Requests, 2010, <http://www.google.com/transparencyreport/removals/government/IN/?p=2011-06>.

⁴³ Google Transparency Report: Break Down by Reporting Period Table, <http://www.google.com/transparencyreport/removals/government/IN/>.

⁴⁴ Google Transparency Report, <http://www.google.com/transparencyreport/removals/government>.

⁴⁵ Rishabh Dara, “Intermediary Liability in India: Chilling Effects on Free Expression on the Internet,” The Centre for Internet & Society, 2012, <http://cis-india.org/internet-governance/intermediary-liability-in-india.pdf>.

⁴⁶ *Ibid.*, Executive Summary.

both specified and nonspecified in the take-down notice. The only take-down notice that was not complied with was one sent to an intermediary (Intermediary F in the report), an online shopping portal which provides a platform for buyers and sellers to connect with each other. The take-down notice was sent without supporting evidence and targeted the sale of a particular brand of baby diapers with the statement that:

such diapers cause Irritant Diaper Dermatitis (commonly referred to as baby rashes) on the convex surfaces of the minor (commonly referred to as the baby's butt) when the skin is exposed to prolonged wetness, increased skin pH caused by urine and feces (commonly referred to as baby's poop).⁴⁷

The take-down notice argued that because of this, the information “harmed minors” as prohibited under Rule 3(2)(c). The intermediary responded to the take-down notice by calling it frivolous, and threatened to take legal action if the take-down notice was not withdrawn.⁴⁸ Though it was encouraging that the intermediary recognized the take-down notice as frivolous, this example highlights the fact that the poorly worded provision makes it impossible for the intermediary to take concrete action against fraudulent take-down notices, as the provision does not make it clear what legal action is available for the intermediary to take.

In another example, a take-down notice was sent to an intermediary (Intermediary B in the Report) who hosts news items and allows for commenting. One of the many comments was in response to the Telangana movement and stated:

Telangana cause is justified, no one is denying that. But have you come to the point, you want to burn India? This is what I am opposing, burning demolition, killing etc. Is the hidden agenda of vested Interests. And we Hyderbadis (Hindues and Muslimes) [sic] will not allow any one to burn our homeland.⁴⁹

A take-down notice was served to the intermediary, stating, among other things, that the comments were “racially and ethnically objectionable,” “hateful,” “disparaging,” and “defamatory” as prohibited under Rule 3(2)(b). The intermediary responded by taking down the comment pointed out in the notice, along with 15 other comments published below the news article.⁵⁰

⁴⁷ Ibid., Sec. 3.6.2, 25.

⁴⁸ Ibid., Sec. 3.6.3, 26.

⁴⁹ Ibid., Sec. 3.2.2, 13.

⁵⁰ Ibid., Sec. 3.2.3, 14.

In yet another example a take-down notice was issued to an intermediary (Intermediary A in the Report), which was an information-location tool, specifically a search engine. The notice asked for “the removal and disablement of three communication link provided in its search engine results on searching for the keywords ‘online gambling,’” as prohibited under Rule 3(2)(b). The notice asked the intermediary to

confirm by email or writing within 36 hours that (i) it has removed the impugned communication links; . . . (ii) it will refrain from, and also prevent it’s [sic] users from, hosting, displaying, uploading, modifying, publishing, transmitting, updating, or sharing any similar communication link; . . . (iii) it has terminated the user accounts from which such communication links were hosted, displayed, uploaded, modified, published, transmitted, updated or shared.

The intermediary responded in 120 hours and claimed that “the take-down regime is not applicable to search engines as they fall within the scope of the exemption offered by Rule 3(3) proviso(a).”⁵¹ Despite this, the intermediary still removed the three communication links and all other URLs for the three links, including subdomains.⁵²

Similarly, a take-down notice was sent to an intermediary (Intermediary D in the Report) that was a host and an information location tool that provided multiple services, including news, shopping, etc. The take-down notice asked for the “removal and disablement” of three communications links that related to “online gambling” as prohibited under Rule 3(2)(b).⁵³ In response, the intermediary rejected the notice because the author had not established himself as an affected party, and claimed exemption under Rule 3(3) proviso(a). Despite rejecting the notice, the intermediary took down the three communication links along with all other URLs to the three websites, including subdomains.⁵⁴

⁵¹ Section 3(3) proviso(a) of the Rules states: “The intermediary shall not knowingly host or publish any information or shall not initiate the transmission, select the receiver of transmission, and select or modify the information contained in the transmission as specified . . . provided that the following actions by an intermediary shall not amount to hosting, publishing, editing, or storing of any such information as specified in sub-rule (2): (a) temporary or transient or intermediate storage of information automatically within the computer resource as an intrinsic feature of such computer resource, involving no exercise of any human editorial control, for onward transmission or communication to another computer resource.”

⁵² *Ibid.*, Sec. 3.1, 7.

⁵³ *Ibid.*, Sec. 3.4.2, 18.

⁵⁴ *Ibid.*, Sec. 3.4.3, 18.

In conclusion, the study found that the vague language in the Rules causes uncertainty in the criteria and procedure that intermediaries must follow for determining what content to remove, thus leading to a situation where intermediaries are more likely to comply with take-down notices than not. The study highlights that for freedom of expression to be protected there is a need to (1) establish safeguards to prevent the misuse of the take-down regime; (2) clearly establish a procedure for the take-down process; (3) put in place mechanisms to ensure transparency and natural justice in the take-down process; and (4) create a standard test for intermediaries to determine what content should and should not be removed from websites.⁵⁵

In August 2012, a round table discussion was arranged by Telecom Minister Kapil Sibal, Secretary of the Department of Information Technology J. Satyanarayana, and National Cyber Security Coordinator and Director General of CERT-in Dr. Gulshan Rai. The meeting was meant to address the many concerns regarding the Intermediary Guideline Rules and to, as stated by Kapil Sibal in the news item, “tweak these rules in such a way that they are acceptable to everybody.” At the meeting private sector companies and organizations, such as Yahoo!, the National Association of Software and Services Companies (NASSCOM), and the Indian Cyber Café Association, critiqued the Rules for placing the burden of determining what content should and should not be removed by intermediaries, creating due diligence procedures that were too strict to be realistically complied with, and for using overly broad language (such as “blasphemous,” “defamatory,” “ethnically objectionable,” etc.).⁵⁶

C. Court Cases Concerning Intermediary Liability

Coinciding with the conclusion of Rishabh Dara’s study in September 2011, Kapil Sibal publicly asked social media sites to proactively screen out inflammatory and disparaging content. According to Sibal, even if a company’s servers exist outside of India, they still need to be subject to domestic law, and cannot violate Indian statutes.⁵⁷ Sibal asked Facebook, Google, Twitter and others to put in place an arrangement where content is screened before going online.⁵⁸ Following this request, a criminal complaint and a civil suit was filed

⁵⁵ Ibid.; Dara, “Intermediary Liability in India.”

⁵⁶ S. Singh, “Stakeholders Steadfast on Changes in IT Rules,” *The Hindu*, 3 August 2012, <http://www.thehindu.com/news/national/article3718615.ece>.

⁵⁷ Timmons, “India Asks Google, Facebook to Screen User Content”; “Social Media Too Needs Regulations: Kapil Sibal,” *IBN Live*, 24 February 2012, <http://ibnlive.in.com/news/social-media-too-needs-regulations-kapil-sibal/233335-3.html>.

⁵⁸ “Online Uproar as Kapil Sibal Seeks Social Media Screening,” *Times of India*, 6 December 2011, <http://timesofindia.indiatimes.com/tech/news/Internet/Online-uproar-as-Kapil-Sibal-seeks-social-media-screening/articleshow/11006585.cms>.

against Google, Facebook, and 18 other Internet intermediaries by two individuals in separate cases. The criminal case asked for content alleged to be hate speech and obscene material to be removed.⁵⁹ The civil case asked for content alleged to be defamatory, derogatory, and per se inflammatory to be removed.⁶⁰ The cases are going on at the magistrate courts in Delhi with a quashing appeal by the intermediaries also simultaneously being heard by the High Court.⁶¹ In the criminal case, the Lower Court removed several of the accused websites as the registered addresses were not available. In response to the appeal filed in the High Court, the proceedings against Microsoft were quashed. The cases are currently subjudice. Based on news coverage of the trials and statements made by politicians it is clear that the Union Government of India is pushing for the take down of content, and for a proactive monitoring regime.

The Intermediary Liability Rules, the increasing number of governmental content removal requests, and the Indian government's push for proactive screening of online content all point to growing intolerance of free speech online.

V. Chilling Effects of Surveillance

A. Eavesdropping Agencies

According to the 1996 *PUCL* ruling, there are 5 central agencies as well as the intelligence agencies authorized by the state governments which have been allowed access to request authorization for interception.⁶² However, according to news reports there are at least 12 central agencies that have tapped phones

⁵⁹ Pranesh Prakash, "Section 200 Complaint in *Vinay Rai v. Facebook India and Ors*," The Centre for Internet & Society website, 20 February 2012, <http://cis-india.org/internet-governance/resources/s200-complaint-vinay-rai-v.-facebook-india-and-ors>.

⁶⁰ Pranesh Prakash, "*Mufti Aijaz Arshad Qasmi v. Facebook and Ors* (Order Dated December 20, 2011)," The Centre for Internet & Society website, 20 February 2012, <http://cis-india.org/internet-governance/resources/order-2011-12-20-mufti-aijaz-arshad-qasmi-v-facebook-and-ors>.

⁶¹ "Can Block Websites Like China, Delhi High Court Warns Facebook, Google," *NDTV*, 13 January 2012, <http://www.ndtv.com/article/india/we-can-block-websites-delhi-high-court-warns-facebook-and-google-166383>.

⁶² People's Union for Civil Liberties, "PUCL PIL Challenging Validity of a Section in the Telegraph Act, 1885." These include: Director Intelligence Bureau, Director General Narcotics Control Bureau, Revenue Intelligence Bureau and Central Economic Intelligence Bureau, Director Enforcement Directorate.

using authorization.⁶³ Additionally, state-level agencies, like the police, conduct wiretaps on a regular basis.⁶⁴ The number of bodies given interception and/or access powers is continuing to expand, as can be seen by the Reserve Bank of India and the Securities and Exchange Board of India being granted the power to access individual call record details in 2013.⁶⁵

B. Scope and Scale of Surveillance

In India corporations and the government are not legally required to be transparent about the extent and nature of surveillance in which they engage. Despite this, there are a few publicly available data points that reveal the scope of governmental surveillance. In 2010, news items cited the Indian government as admitting to legally tapping over 6,000 telephones in New Delhi per year.⁶⁶ To place these numbers in perspective, in 2010, in the United States, 3,194 authorized intercepts were conducted.⁶⁷ As another data point, in 2011, Reliance Infocomm filed an affidavit stating that in 2005 the company intercepted 3,588 phones in New Delhi alone, and between 2006 and 2010, the company intercepted 1.51 lakh telephones throughout India at the request

⁶³ Intelligence Bureau, Narcotics Control Bureau, Central Economic Intelligence Bureau, Directorate of Revenue Intelligence, Central Board of Direct Taxes, Research Analysis Wing, Central Bureau of Investigations (Ritu Sarin, "Govt Sets Norms for Lawful Interception and Monitoring," *The Indian Express*, 17 February 2012, <http://www.indianexpress.com/news/govt-sets-norms-for-lawful-interception-and-monitoring/913034/0>); Income Tax Department ("SC Directs IT Dept to Transcribe Tapped Conversation of Radia," DNA, 6 September 2012, http://www.dnaindia.com/india/report_sc-directs-it-dept-to-transcribe-tapped-conversation-of-radia_1737582); the National Technical Research Organization ("The Listeners," *The Indian Express*, 6 June 2012, <http://www.indianexpress.com/news/the-listeners/958266/0>); Directorate of Signal Intelligence (in sensitive areas of the country), TERM, and DoT (M. A. Arun, "Big Brother, Smaller Siblings Watching You," *The Deccan Herald*, 4 September 2010, <http://www.deccanherald.com/content/94085/beware-big-brother-smaller-siblings.html>).

⁶⁴ A. E. Suresh, "Govt to Come Down Hard on Unauthorized Phone Taps," *Live Mint*, 18 May 2011, <http://www.livemint.com/2011/05/18002647/Govt-to-come-down-hard-on-unau.html>.

⁶⁵ B. Jain, "Govt Gives Sebi, RBI, Access to Call Data Records," *Times of India*, 14 June 2013, http://articles.timesofindia.indiatimes.com/2013-06-14/india/39975284_1_home-ministry-access-call-data-records-home-secretary.

⁶⁶ "The Secret World of Phone Tapping," *India Today*, 20 December 2010, <http://india-today.intoday.in/story/the-secret-world-of-phone-tapping/1/122693.html>.

⁶⁷ Director of the Administrative Office of the United States Courts, "Applications for Orders Authorizing or Approving the Interception of Wire, Oral, or Electronic Communications," June 2011, 5, <http://www.uscourts.gov/uscourts/Statistics/WiretapReports/2010/2010WireTapReport.pdf>.

of security agencies.⁶⁸ Corporate transparency reports are another indicator of the scope of surveillance in India. For example, Facebook's Governmental Requests Report shows that India issued 3,245 data requests in the first six months of 2013,⁶⁹ while the Google Transparency Report indicates that in 2011 the government of India made 18,257 user data requests, in the beginning of 2012 it shows that 20,938 user data requests were issued, and by the end of 2012, the GOI had issued 21,389 user data requests.⁷⁰ Yahoo, on the other hand, received 1,490 data requests and 2,704 requests on specified accounts in the first six months of 2013.⁷¹

Despite these numbers, even a high-level understanding of the scope and scale of surveillance in India is not easy as the amount of unauthorized or illegal surveillance that takes place is unknown. It is clear though that "easy to use" technologies with interception capabilities like "off the air" GSM/CDMA monitoring systems, along with a pervasive fear of terrorism, the need to strengthen national and cyber security, and the lack of strong enforcement, has enabled an environment in which legal safeguards and procedures for surveillance can be bypassed. For example, in 2013 it was found in Himachal Pradesh that phones were being intercepted on grounds not defined in the Indian Telegraph Act, 1885, and without proper authorization. It was also found that the intercepted data was being retained longer than the permitted period, and action was not being taken off of collected data.⁷² Previously, it was revealed that between 2010 and 2011 a governmental body known as the Defence Intelligence Agency had purchased surveillance equipment without authorization, and despite the issue being brought to the attention of the Prime Minister's Office, the agency was not stopped from using the equipment.⁷³

Unauthorized interception can also take place through informal requests from security agencies or law enforcement. News items indicate that these informal requests are regularly issued to service providers, who in turn,

⁶⁸ "Phone Tapping Has Checks and Balances in Place, Says Govt," *The Economic Times*, 16 February 2011, http://articles.economictimes.indiatimes.com/2011-02-16/news/28552149_1_phone-tap-orders-interception-indian-telegraph-act.

⁶⁹ Facebook, Governmental Requests Report, 2013, https://www.facebook.com/about/government_requests.

⁷⁰ Google, Transparency Report, <http://www.google.com/transparencyreport/userdata-requests/>.

⁷¹ Yahoo, Transparency Report, <http://info.yahoo.com/transparency-report/>.

⁷² "Probe into Humachal Phone Tapping Over, Report Submitted," *Znews*, 15 June 2013, http://zeenews.india.com/news/himachal-pradesh/probe-into-himachal-phone-tapping-over-report-submitted_855298.html.

⁷³ S. Datta and P. Sagar, "DNA Exclusive: PMO Know You Were Being Snooped Upon," *DNA*, 17 September 2012, http://www.dnaindia.com/india/report_dna-exclusive-pmo-knew-you-were-being-snooped-upon_1741818.

more often than not, comply with the requests.⁷⁴ The probability of informal requests being complied with is augmented by the fact that the Indian surveillance regime does not provide a legal mechanism for service providers to easily challenge requests, and issues a heavy penalty on service providers for noncompliance.⁷⁵ In 2013, in an attempt to curtail illegal intercepts from taking place, the Department of Telecommunications proposed a Rs. 2 crore penalty to be added to the interception provisions in the Indian Telegraph Act, 1885.⁷⁶

C. Surveillance Systems

To expand the interception capabilities of security agencies, India has steadily been putting in place infrastructure that allows for electronic monitoring to be carried out on a greater scale and with more granularity. For example, in 2010, the National Intelligence Grid (NATGRID) was established as an attached office of the Ministry of Home Affairs, and is expected to be legalized through an executive order in 2013. The system will significantly broaden the scope of access available to security agencies by linking 21 databases together in real time.⁷⁷ Presently, the government is implementing the Centralized Monitoring System (CMS) to enable legal interception in real time in such a way that bypasses the service provider.⁷⁸ The government has also made plans to create the National Cyber Coordination Centre for monitoring all traffic coming in and out of the country.⁷⁹

Despite the development and high expectations of these systems, many have been unsuccessful due to high costs, technology failures, and legal provisions that do not allow the government to bypass existing procedure and easily put in place ubiquitous real-time monitoring and interception sys-

⁷⁴ Arun, "Big Brother, Smaller Siblings Watching You."

⁷⁵ Under Section 69 of the Information Technology Act 2000 service providers can be penalized with up to seven years in jail for noncompliance.

⁷⁶ "DoT Proposed Rs. 2 Cr. Penalty on Illegal Phone Tapping," *Live Mint & the Wall Street Journal*, 31 May 2013, <http://www.livemint.com/Industry/FGyRtuGFdGI-TuqpXdaT2GI/DoT-proposes-Rs-2-cr-penalty-on-illegal-phone-tapping.html>.

⁷⁷ A. Sharma, "NATGRID to Get Legal Powers Soon," *The Economic Times*, 10 September 2013, http://articles.economictimes.indiatimes.com/2013-09-10/news/41938113_1_executive-order-national-intelligence-grid-databases.

⁷⁸ "Soon Security Agencies to Intercept Email, Chats in Real Time," *Times of India*, 12 May 2011, http://articles.timesofindia.indiatimes.com/2011-05-12/india/29535755_1_security-agencies-cms-intercept.

⁷⁹ "Govt Proposes Agency to Monitor Internet Traffic," *Times of India*, 5 March 2012, http://articles.timesofindia.indiatimes.com/2012-03-05/security/31123879_1_cyber-security-nscs-high-level-meeting.

tems. For example, the National Technical Research Organization (NTRO) “Vishwarupal” spy system, which was proposed as part of the CMS system, failed to capture 100% of Internet data, collecting only 3 GBPS of traffic out of 28 GBPS, and crashed multiple times during trial runs.⁸⁰ Though the NATGRID first began in 2010, it is only in 2013 that an executive order is being issued to legalize the linking and real-time access of the multiple databases. Similarly, international and national press has repeatedly questioned the legality and transparency of the CMS.⁸¹

The pervasive nature of these systems without adequate legal safeguards in place, and combined with the trend toward digitizing, recording, and data basing all transactions through schemes like the Unique Identification project (a proposed national identification scheme based on biometrics that is to be adopted by multiple platforms),⁸² is facilitating the monitoring and tracking of Indian citizens and residents, without their knowledge across devices, networks, and databases.

In addition to the government developing solutions for interception via independent projects and systems, the Indian government ensures access to individuals’ communications and Internet use via technologically requirements for ISPs. In 2012, the government requested that ISPs put in place Lawful Intercept and Monitoring (LIM) facilities so that security agencies would have full access to all services, including BlackBerry Messenger (BBM), Nokia, Pushmail, Skype, Yahoo, Gmail, etc., and included this as a part of the license agreement with the ISPs.⁸³ Since that time ISPs across India have been seeking approval from the Department of Telecommunications for installed LIM solutions for different services.⁸⁴

⁸⁰ “Govt’s Internet Spy Systems Fail to Capture 100% Data Traffic,” *Times of India*, 10 March 2012, <http://timesofindia.indiatimes.com/tech/enterprise-it/security/Govts-Internet-spy-systems-fail-to-capture-100-data-traffic/articleshow/12208491.cms>.

⁸¹ For example, see P. Duggal, “Central Monitoring System—A Legal Viewpoint,” *Deccan Herald*, 20 June 2013, <http://www.deccanherald.com/content/341759/central-monitoring-system-legal-viewpoint.html>; Human Rights Watch, “India: New Monitoring System Threatens Rights,” 7 June 2013, <http://www.hrw.org/news/2013/06/07/india-new-monitoring-system-threatens-rights>.

⁸² H. Kanakia, “A UID Numbering Scheme,” UIIDAI, May 2010, http://uidai.gov.in/UID_PDF/Working_Papers/A_UID_Numbering_Scheme.pdf.

⁸³ Government of India Press Information Bureau, “Interception Solutions by Networking Service Providers,” 14 March 2012. <http://pib.nic.in/newsite/PrintRelease.aspx?relid=80948>.

⁸⁴ For example, in 2013 Vodafone sought approval of their LIM solution for their Video Conferencing Services (“Vodafone Seeks DoT Nod for Pan-India Video Conferencing,” *Times of India*, 10 July 2013, http://articles.timesofindia.india-times.com/2013-07-10/telecom/40491452_1_telecom-major-vodafone-security-norms-3g-spectrum).

Currently, the Indian interception regime lacks safeguards that would protect the rights of the individual. For example, individuals cannot seek redress if their communications—offline or online—are illegally intercepted by the government. The impact of this lacunae is exacerbated by the fact that India does not adhere to the “fruit of the poisonous tree” doctrine, and evidence for one crime obtained while investigating another crime, is accepted in Indian courts. One example of this is the Ratan Tata case, where the 2G Scam was uncovered while agencies were tapping for tax fraud.⁸⁵ In *Shri Omprakash Housilprasad Yadav v. Appellate Officer & Deputy Secretary 2007* the Maharashtra State Information Commission denied the petitioners request to know if his phone had been wiretapped, stating that a person is not entitled to receive information as to whether his telephone has been tapped or not by the government.⁸⁶

The scale and scope along with the pervasive and nontransparent nature of state surveillance, and the lack of redress that is afforded to individuals in India, curtails freedom of expression, as individuals have no protection against inaccurate or illegal accusations and penalties supported by surveilled material.

VI. The Chilling Effect on Freedom of Expression

In India there has been a significant dilution of safeguards across surveillance and intermediary liability provisions. In the case of surveillance, traditional access through the CrPc incorporates judicial oversight at some level, yet interception requires approval only from the executive, while monitoring and collection of traffic data needs only the approval of a bureaucrat. Similarly, governmental take-down orders must be approved by a joint secretary of the central government,⁸⁷ whereas individuals can now request the removal of any content found to be in contravention with legally permitted content. These dilutions have made it easier for individuals’ communications, particularly online, to be monitored and censored, and in effect have had a chilling effect on free speech. Furthermore, the retention and sharing of personal information that is connected to the content that has been

⁸⁵ Press Trust of India, “India Needs Law against Invasion of Privacy: Ratan Tata,” *The Economic Times*, 16 February 2011, http://articles.economictimes.indiatimes.com/2011-02-16/news/28551990_1_group-chairman-ratan-tata-niira-radia-conversation-with-corporate-lobbyist.

⁸⁶ B. Viju, “Phone Taps Not Covered under RTI,” *Times of India*, 4 October 2007, http://articles.timesofindia.indiatimes.com/2007-10-04/india/27978189_1_indian-telegraph-act-phone-taps-rti-act.

⁸⁷ These Rules are found under Section 69A of the ITA but are not discussed in this paper.

blocked, removed, or filtered, with law enforcement agencies, has negative implications for privacy.

When looking at past targets of surveillance activities in India, it has been mostly political and business personalities that have been targets of wiretapping.⁸⁸ Many of these wiretaps, one way or another, end up being leaked to the public supposedly, among other reasons, to expose various scams. Ironically, the fact that the majority of taps conducted are on politicians themselves is important to note, because it highlights an overlooked element of transparency in India's democracy.

As demonstrated by the manner in which the practice of unauthorized interception is ignored by higher authorities,⁸⁹ carried out routinely by security agencies,⁹⁰ and undertaken for broad and unspecified targets,⁹¹ the distinguishing features of the Indian policy on interception seems to be subsidiarity and informality. As demonstrated above, the present interception and intermediary regime has made it possible for the government to take down, block, intercept, monitor, and target everyday communications through blanket and targeted monitoring and interception. The negative impact of these actions on an individual's right to free speech and privacy is worsened by the lack of enforcement of existing procedures and safeguards.

The government's demand for monitoring, content regulation, and access to services such as BlackBerry, Twitter, and Google curtail the freedom of expression through the threat of content removal and unlimited interception at all costs. From the policy and practice surrounding these regimes, it appears that the Indian government believes that the only way of addressing national threats is through enacting legislation that lack critical judicial/legislative safeguards and severely curtails the freedom of expression, even without proof that such curtailment is effective. By imposing restrictions on the freedom of expression by intercepting communications and regulating online content, both of which authorization for lie outside of the purview of the judiciary, the government seems to have forgotten their responsibility to protect the rights of both the online reader and writer.

⁸⁸ S. Datta, "We the Eavesdropped," *Outlook*, 3 May 2010, <http://www.outlookindia.com/article.aspx?265191>.

⁸⁹ This article explains how the Prime Minister's Office and the National Security Advisor turned their heads when it was brought to their attention that the Defense Intelligence Agency was acquiring interception equipment without authorization (Datta and Sagar, "DNA Exclusive").

⁹⁰ Arun, "Big Brother, Smaller Siblings Watching You."

⁹¹ This article describes how Indian security agencies use off the air GSM/CDMA systems in Delhi "in the hope that we might pick up critical conversations" (S. Datta, "A Fox on a Fishing Expedition," *Outlook*, 3 May 2011, <http://www.outlookindia.com/article.aspx?265192>).

This message can be seen through the media's portrayal of the issues at hand. Recent news items reflect societal perceptions of these new regimes that expand state surveillance. Using phrases such as "Big Brother's Watching You" (*Deccan Herald*),⁹² "Phone Tapping: Security Monitoring Body Will Intercept Phone Calls, Analyse Billing Records" (*Economic Times*),⁹³ "Phone Tapping Serious Assault on Democratic Rights, Says CPI" (*India Today*),⁹⁴ "New IT Rules Give Big Brother Free Access to Sensitive Personal Information" (*The Hindu*),⁹⁵ and "The Walls Have Ears" (*Outlook*),⁹⁶ news items indicate that society does perceive the current regimes having a negative impact on freedom of expression.

When examined simultaneously, both the intermediary liability and the interception regime exemplify how ISPs, online platforms, and telcos are placed in situations where they are forced to comply with the government's orders—resulting in massive infringement on civil liberties. In particular, the right to free speech and the right to privacy.

⁹² S. Abraham, "Big Brother Is Watching You," *Deccan Herald*, 7 March 2014, <http://www.deccanherald.com/content/165420/big-brother-watching-you.html>.

⁹³ J. Philip, "Phone Tapping: Security Monitoring Body Will Intercept Phone Calls, Analyse Billing Records," *Economic Times*, 18 May 2011, http://articles.economic-times.indiatimes.com/2011-05-18/news/29555914_1_communication-security-research-telecom-ministry-cabinet-secretary.

⁹⁴ "Phone Tapping Serious Assault on Democratic Rights, Says CPI," *India Today*, 24 April 2010, <http://indiatoday.intoday.in/story/Phone+tapping+serious+assault+on+democratic+rights,+says+CPI/1/94445.html>.

⁹⁵ S. Joshi, "New IT Rules Give Big Brother Free Access to Sensitive Personal Information," *The Hindu*, 10 May 2011, <http://www.thehindu.com/sci-tech/technology/article2004533.ece>.

⁹⁶ S. Datta, "The Walls Have Ears," *Outlook*, 11 July 2011, <http://www.outlookindia.com/article.aspx?277470>.

The “Turkish Model” of Freedom of Speech¹

ZEYNEP ALEMDAR

I. Introduction

In discussions concerning the future of the Arab spring, Turkey was posited as the “model”. The “Turkish model,” portrayed as a successful blend of Islamism and democracy, was popular among both Western and Arab commentators, but Turkey has been subject to a large amount of internal and external criticisms regarding the situation of freedom of speech in the country, especially since the wide protests all over Turkey after the Gezi Park events in June 2013, the corruption allegations that rocked the country before the 17 March 2014 local elections as well as the disruption of elections because of the power outages during the vote countings.

A brief look at Reporters Without Borders’ webpage on Turkey, an organization that monitors press freedom around the world, one could easily see various reports documenting abuses against freedom of speech and to information in the country. In 2012, the organization named Turkey as the ‘biggest prison for journalists’, ranking Turkey above China, Eritrea, Iran and Syria for the number of journalists in prison, in 2013 Turkey was only topped by China and Eritrea, followed by Syria.² Out of the 67 journalists, along with an indeterminate number of politicians, activists, and students, many

¹ I am indebted to Ümit Altaş for the support he provided during the writing of this chapter, including his generous sharing of knowledge on legal matters. This is an updated version of the author’s article ““Modelling” for Democracy? Turkey’s Historical Issues with Freedom of Speech, *Middle Eastern Studies*, 50, 1. (In print, DOI:10.1080/00263206.2014.886573).

² <http://en.rsf.org/turkey.html>, 20 May 2014.

of whom are alleged to be members or supporters of illegal organizations, who were jailed before June 2013, journalists and writers have been imprisoned because of the news pieces and books they have written, the others have been arrested for allegedly having connections with Kurdish and leftist organizations which have been banned or for being involved in the Ergenekon.³ On October 29, 2011, the International Pen Honorary Writer and publisher Ragıp Zarakolu was arrested along with forty-one individuals, including international relations professor Büşra Ersanlı, and charged with “membership in an illegal organization.” Zarakolu noted, however, that he was not even questioned about the organization; rather, he was interrogated about the works that he had written and edited, as well as the speeches he had given and attended.⁴

Per the terms of international law, however, most of these “crimes” would constitute an exercise of the right to free speech. Even though Turkey is a signatory to the relevant international conventions and the Turkish Constitution recognizes the supremacy of international law, rights to free expression and the freedom of the press have been severely curtailed. Critiques of these arrests, however, have been widespread. Jerry Buzek, head of the European Parliament, stated at a press conference in Ankara that the number of arrested journalists was unusually high in Turkey, and he noted that “The argument that the journalists are against the government is unacceptable. It is typical for journalists to write and question the government.

³ “Jailing of Reporters has a ‘chilling effect’ on Turkish media- OSCE,” 13 June 2013, <http://www.reuters.com/article/2013/06/13/turkey-media-osce-idUSL5N0EO24S20130613>. The Kurdistan Workers’ Party (PKK) has been launching military attacks in Turkey since 1984, seeking autonomy and sovereignty for the Kurds living in Turkey. the PKK declared a ceasefire from 1999, when Abdullah Ocalan was apprehended and imprisoned, to 2005. Since 2005, however, the ceasefire has been interrupted, and the Kurdish issue continues to be perceived as the most important threat to the unity and integrity of the Turkish state. In the 1970s, leftist organizations were considered to be a threat to the Turkish state, and in the post-Cold War era, they have constituted the foundation for most anti-neoliberal activism. The Ergenekon is argued to be a clandestine organization with strong ties to the military which has acted as a “deep state” trying to govern the country as it pleases. By 2010, a total of 270 people, including 116 military officers and 6 journalists, had been charged with attempting to overthrow the government and instigate armed riots (EU 2010, *European Commission Turkey 2010 Progress Report* (SEC 2010) 1327. Available from http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/tr_rapport_2010_en.pdf accessed 21 August 2011.

⁴ Philip Boroff. “Jailed Publisher Decries, ‘Mass Lynching’ in Turkish Crackdown.” Accessed November 25, 2011. <http://www.bloomberg.com/news/2011-11-23/jailed-publisher-decries-mass-lynching-campaign-in-turkish-crackdown.html>. Zarakolu was acquitted in March 2012.

That should not be surprising.”⁵ Buzek’s observations reflect the preposterousness of the charges made against these journalists, writers, and publishers, and are indicative of the state of freedom of expression and freedom of the press in Turkey.

In Turkey, there is a lack of understanding about just what freedom of speech means. Despite the legal changes which have been implemented to improve the protection of free speech, Turkish authorities have found ways around the new laws, and judges and attorneys have adopted their own visions of what freedom of speech should be. Moreover, problematic indictments, including that of Ahmet Şık, a journalist under arrest because of his unpublished manuscript⁶ about the intricate relations within the “deep” state, have raised doubts about the real motives of these arrests and whether they are aimed at silencing all forms of opposition to the government.

Given the context outlined above, this chapter seeks to explore how and why Turkey’s record of freedom of speech has been problematic. The first section provides an overview of legal cases which have been launched and summarizes the laws underpinning the allegations. It focuses on how the Anti-terror Law, the Criminal Law, and the Press Law have been used to punish acts of free speech. The second section examines the problems concerning the interpretation of these laws. Lack of knowledge about international law, political pressure on the judiciary, and most importantly, the latter’s interpretation of what freedom of speech means constitute the major impediments to freedom of speech in Turkey.

A thorough discussion of how and why Turkish authorities have found ways to breach international laws, and an exploration of how judges and attorneys have been able to implement their own visions of freedom of speech will be helpful in drawing comparative conclusions for other parts of the world.

II. Many Cases... Many Laws...

Of the seventy-one journalists imprisoned as of December 2011, twenty-five of them were jailed for alleged connections with Kurdish terrorist organizations, seventeen were indicted for supposedly having ties to leftist terrorist organizations, and sixteen of them were charged with being involved in the Ergenekon organization.⁷ There is also an indeterminable number of students,

⁵ *Hürriyet Daily News*, 26 November 2011.

⁶ Şık was arrested in March 2011 and his book is published in October 2011 with the signature of 124 journalists. He was later acquitted in March 2012

⁷ Ercan Gülcan. “71 Gazeteci Hapiste.” Accessed November 22, 2011, <http://bianet.org/bianet/diger/134038-71-gazeteci-hapiste>.

activists, professors, and mayors who have been detained for crimes falling under the jurisdiction of the Criminal Law and Anti-Terror Law. The indictments of those detainees' are often problematic, and include involvement in environmentalist and feminist protests in addition to participation in events related to Labor Day as "proof" that these individuals were guilty of membership in illegal organizations.⁸

Given the history of freedom of speech in Turkey, this poor state of affairs should come as no surprise. There is a tradition in Turkey in which the state tends to silence opposition whenever it is perceived as being necessary and power is even wielded against citizens who are critical of state institutions. This "necessity" has been justified on the grounds of perceived threats to the unity of the state. Creating a sovereign nation-state on the ashes of the Ottoman Empire immediately following World War I, the founders of the republic deemed it necessary to carefully engineer a nation united around the perception of internal threats. Ethnic and religious divides were perceived to be the most significant threats at the time, and they still take center stage. Most of the current violations of freedom of speech stem from fears that the country will be rent asunder by internal strife.

On the other hand, Turkey has gone through an extensive reform process since the most recent military coup in 1980 and has widely adopted EU laws and regulations. Most importantly, the Turkish Constitution recognizes the supremacy of international law over domestic rulings in terms of fundamental rights and freedoms. For this reason, if a conflict arises between domestic laws and international law due to differences in provisions, the provisions of international agreements prevail (Article 90). However, laws are interpreted in a manner that does not comply with international provisions since Turkish decision makers have a limited understanding of freedom of speech. This section provides an overview of the laws utilized to press charges and examines how, under the Anti-terror Law, the Criminal Law, and the Press Law, acts of free speech are punished.

The most controversial of these is the Anti-terror Law which came into effect in 1991, when the clashes between the Turkish military and the Kurdistan Workers' Party (PKK), were at their height. It was first amended in 2003 as a result of the European Union reform process, concurrent with the ceasefire with the PKK from 1999 to 2005. The EU was pushing for democratization, and the capture of Abdullah Öcalan, head of the PKK, created a suitable environment to relax the laws. In 2006, however, following the PKK's

⁸ Ezgi Başaran. "Az Söylemişsiniz, Aslında Biz Sosyalistler Daha Neler Yapmıştık." *Radikal*, August 9. Accessed November 27th. <http://www.radikal.com.tr/Radikal.aspx?aType=RadikalYazar&ArticleID=1059302&Yazar=EZGİ BAŞARAN&Date=27.11.2011&CategoryID=96>.

decision to end the ceasefire, the Anti-terror Law was amended to include a more comprehensive definition of terrorism.⁹

The Anti-terror Law contains a vague and far-reaching definition of terrorism, and it stipulates that individuals who publish or broadcast communiqués or statements of terrorist organizations shall be imprisoned for three years (Article 6). It also punishes the spreading of propaganda for terrorist organizations, and if such propaganda is published through the press or broadcast, the law states that punishment shall be increased by half. Publishers and owners of media outlets can also be punished under the tenets of the law through fines (Article 7). Additionally, journalists charged for crimes defined under the Anti-terror Law for alleged links to illegal organizations face even longer prison terms. As an example of this, the editor of the Kurdish-language daily *Azadiya Welat* was sentenced to 166 years of imprisonment for his news commentaries and articles.¹⁰

It is not only journalists, however, who have been put on trial under the Anti-terror Law. A university student, Cihan Kırmızıgül, who was wearing a poshu-scarf near a grocery store that was attacked by unidentified individuals wearing similar scarves, had been held in detention for more than two years on charges of being a member of the PKK.¹¹ Critiques of the Anti-Terror Law are more prominent when such cases receive media attention. The Press Law and the Criminal Code have also been widely used to curtail acts of freedom of speech. The new Criminal Code was introduced in 2004 as a result of the EU accession process and the terms of the law comply with EU acquis. For journalists, however, Article 314 of the Criminal Code prescribes five to ten years of prison for membership in an illegal organization¹² and Article 329 indicates that journalists involved in "disclosing information related to the security and political interests of the State" shall be put on trial and punished. Some lawyers have also pointed out that Article 288 of the Criminal Code provides for the punishment of individuals who attempt to compromise the fairness of a trial, arguing that even if the Anti-terror Law is changed, this Article may be used against journalists. Since the "security and political inter-

⁹ The new law prescribed harsher penalties for "propaganda" and "praise" of terrorism. This broader definition of terrorist acts was not in line with the Council of Europe Convention for the Prevention of Terrorism (CETS 196).

¹⁰ His work, which he writes in Kurdish, was translated into Turkish for the court by an "expert" who noted in the report that he translated as much as he could understand. Vedat Kurşun. "Kürt Gazeteci Olmak". *Tutuklu Gazete (Arrested Journal)*, July 24, 2011.

¹¹ *Turkish Daily News*, September 15, 2011. Cihan Kırmızıgül released from prison in March 2012, yet his trial continues as of September 2012.

¹² For a detailed account, see OSCE Report's Annex to the Statement of the OSCE Representative on Freedom of the Media on Imprisoned Journalists in Turkey. Accessed November 26, 2011. <http://www.osce.org/fom/76373>.

ests of the State” and what constitutes an “attempt to compromise a fair trial” are vague and difficult to define, it is left to the discretion of attorneys and judges to make rulings in such cases.

Another problematic issue has been the rapid rate of reforms in the past decade. Since 1999, major changes have been introduced to the Criminal Code and the Anti-Terror Law, with little attention given to what these changes imply for the totality of the body of law. Since the amendment process was not undergirded with the intention to integrate the entirety of changes in all the laws, judges have had the leeway to either make narrow interpretations of laws and enact rulings which they perceived to be a threat to the security or political interests of the State, or they have deferred cases to higher courts, extending the due process of law.

For instance, despite the changes to the laws implemented in 2004, including the lifting of the ban on radio and TV broadcasting in languages other than Turkish, a redrafting of the Press Law, and an amendment to the Criminal Code to decriminalize acts of expression that provided information or were critical in nature, journalists were simply imprisoned under different laws. In practice, Article 301 of the new Criminal Code (formerly Article 159, concerning “insults to the state and state institutions”) was used to prosecute and, in some cases, convict individuals.¹³ Nobel-prize winning novelist Orhan Pamuk, the editor of the bilingual Armenian/Turkish weekly newspaper *Hrant Dink*, who was assassinated in 2007, and the publisher Ragıp Zarakolu were all put on trial under the auspices of this article for remarks they made regarding the killings of Armenians and Kurds in Turkey. Another writer, Emin Karaca, was convicted under the same article for critiquing the past actions of the Turkish military. These cases were reported on in the EU progress reports as well, and EU comments on the cases were noteworthy, highlighting the importance of the education of the judiciary in addition to reiterating the necessity of the adoption of Article 10 of the ECHR and the relevant case law of the ECtHR: “... if the code continues to be interpreted in a restrictive manner, then it may need to be amended in order to safeguard freedom of expression in Turkey. In this context court proceedings based on Article 301 will be closely monitored.”¹⁴

In addition to the problem of narrow interpretation, the discontinuity of implemented changes has proven to be problematic. Amendments to laws have been carried out in such a manner that other laws could be invoked should the amended law lack the desired jurisprudence. For example, the Press Law was amended with the aim of “avoiding prison sentences in cases

¹³ “European Commission Turkey 2005 Progress Report (SEC 2005) 1426.” Accessed August 21, 2011. http://ec.europa.eu/enlargement/archives/pdf/key_documents/2005/package/sec_1426_final_progress_report_tr_en.pdf.

¹⁴ *Ibid*, 26.

of offences committed through the press.”¹⁵ The Criminal Code, however, contained articles which have been used to imprison journalists who were covering court proceedings. Article 285 dictated a sentence of imprisonment for four and a half years in cases of “violation of the confidentiality of an investigation,” while Article 277 prescribed two to four years prison terms for convictions of attempts to “sway the justice system.” Under Article 216, defamation through the press with the aim of implicating someone in a judicial investigation is punishable by a prison sentence of one to four years.¹⁶ Indeed by 2005, an estimated sixty writers, publishers, and journalists were on trial in Turkey.¹⁷

The changes made to laws in 2003 represent yet another example of the difficulties that have been faced. In 2002 and 2003, several changes were made to the infamous Criminal Code Articles 159 and 312. In 2003, Article 8 of the Anti-Terror Law (concerning propaganda against the indivisible unity of the state) was repealed. The minimum punishment for threatening the Turkish republic’s indivisible unity and demeaning the state (Article 159) was reduced from one year to six months in prison. Some restrictions on the press were lifted, including the abolishment of Article 8 of the Anti-Terrorism Law, and the proceedings resulting from it, for which Turkey had been widely criticized by the Council of Europe and other international bodies, were lifted. However, as the 2003 EU report stated:

With respect to the effect of reforms in practice, the implementation of amended Articles 159 and 312 of the Turkish Criminal Code, and of Article 7 of the Anti-Terror Law is not uniform. Heavy penalties, including imprisonment are reportedly inflicted at times upon journalists, authors and publishers who criticize state institutions and policies, or publish the statements of certain political groups.¹⁸

The discontinuity of the laws was recognized by state officials as well. During discussions about Article 301, the Minister of Justice himself pointed out that if that article was repealed, then other laws would simply be used in its stead.¹⁹ As of September 2012, as the Constitutional Reconciliation

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ EU 2003, “Commission of the European Communities 2003 Regular Report on Turkey’s Progress Towards Accession.” Accessed August 7, 2011.

¹⁹ Baskın Oran. “TBMM Başkanımız Hayırlı Olsun.” *Radikal* 2, July 10. Accessed August 20, 2011. <http://www.radikal.com.tr/Radikal.aspx?aType=RadikalEklerDetayV3&ArticleID=1055885&Date=20.08.2011&CategoryID=42>. Article 301 of the Criminal Code was amended in 2008. The amendments introduced a requirement that permission had to be obtained from the Minister of Justice for a criminal investigation to be launched. Following the adoption of the amendments in May, by Septem-

Committee carries on its work to change the restrictive 1982 Constitution, it seems like the discontinuity of laws would not be a matter anymore since the proposed changes to the article on the “Freedom of Press and Publication” are actually more prohibitive.²⁰

The implementation of reforms has been difficult, and the voices of journalists have occasionally been silenced by judges based on their own interpretations of freedom of speech. But, why have judges interpreted laws in such narrow terms and, why have they envisioned themselves as protectors of the state and meting out punishment to individuals they perceive to be threats rather than using their powers to interpret freedom of speech more liberally? The next section explores these questions, making use of the limited amount of literature concerning the problems judges have faced as they themselves have expressed them. Recently, the judiciary has become a popular topic of discussion and the problems associated with the court system and judges have

ber the Turkish courts had forwarded 257 cases to the Minister of Justice for authorization. The wording of Article 301 remained largely the same, and the requirement of prior authorization opened up the possibility that the article will become subject to political sway (EU 2008, 15). On September 14, 2010, the court delivered its judgment in the case of *Dink vs. Turkey* in which it found a violation of Article 10 of the ECHR on account of Hrant Dink's conviction, which was based on Article 301. The court held that Hrant Dink's conviction for denigrating Turkish identity prior to his murder did not correspond to any “pressing social need” which is one of the major conditions on which interference with one's freedom of expression may be warranted in a democratic society. As Hammerberg report (“Freedom of expression and media freedom in Turkey” Council of Europe Commissioner for Human Rights Report CommDH(2011)25, accessed August 7 <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1814085&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FE C65B&BackColorLogged=FFC679>) states, the commissioner found that the amendment adopted in 2008, which requires that the prosecution attain prior authorization by the Ministry of Justice in each individual case, is not a lasting solution for the integration of the relevant ECHR standards into the Turkish legal system and practice, and that this will not prevent repeat violations of the Convention. For a detailed discussion of the wording of the article, see Bülent Algan, 2008. “The Brand New Version of Article 301 of Turkish Penal Code and the Future of Freedom of Expression Cases in Turkey.” *German Law Journal* 9: 2237-2252.

²⁰ The AKP's proposal on the article on freedom of press aims to place all provisions related to the press in a single article of the new Constitution, which may be interpreted as a solution to the confusions regarding the interpretation of different laws. Yet, the proposal eliminates the current language preventing seizures, confiscations and operations bans against printing houses that were lawfully established as press institutions. Moreover, the current guarantee that those who wish to establish a printing house do not need to seek permission or provide financial assurances is to be removed, see <http://www.bianet.org/english/freedom-of-expression/139707-akp-government-lands-massive-blow-to-press-freedom>. Another problem with the proposed changes is the confirmation of the state's responsibility to protect “public morals”.

received more attention. Given the lack of literature on the sociology of law in Turkey, scant newspaper interviews with judges and the commentaries they have published represent the data available. Despite this limitation, such sources nonetheless provide us with many insights regarding the reasons for their tendency towards narrow interpretation.

III. Interpretations: Judges and their Difficulties

The first apparent reason why Turkish judges tend not to follow international law is their lack of knowledge of foreign languages. Very few judges speak languages other than Turkish and thus cannot follow case laws of other countries, which is crucial for the interpretation of fundamental national laws.²¹ Not knowing what the freedom of speech entails, judges are left to their own interpretations and their background and social environment impact their decisions as well.

Some judges and lawyers who have formed groups and associations in order to highlight their professional problems have indicated the systematic causes of their troubles. In Turkey, a student with a bachelors' degree in law can enter a centralized exam and become a judge after six months of pre-vocational training. Then (s)he can then be appointed to a post through a lottery administered by the High Council of Judges and Prosecutors.²² At an early age, judges and attorneys are then sent to various locales where they can socialize only with their colleagues, as well as other “elites” of the state, such as the local governor, the chief of the police, or the gendarmerie, with whom at times they would need to raise their voices in opposition. However, their livelihood depends on these closed relations, and they place greater value on the state, the institution on which their whole career depends, rather than the individual.²³ They therefore lack the necessary independence and are consequently unable to uphold democratic values.²⁴

Moreover, judges are prone to political pressure. For instance, in April 2009, amidst debates about the writing of a new constitution and the “Kurdish Initiative” to institute more democracy to solve the Kurdish problem, an operation against the Democratic Society Congress (KCK), what was

²¹ Murat Arslan. “Dialogue of Judges - The impact of the European Court of Human Rights Judgements on Turkish Constitutional Court’s Case-Law.” Accessed 9 ecember 2011. We should also note that most cases of the ECHR are translated; for example the Police Academy’s Journal translates the ECtHR law in each issue.

²² See http://www.hsyk.gov.tr/dosyalar/hsyk_katalog.pdf for the duties and functioning of the High Council of Judges and Prosecutors (HCJP).

²³ Faruk Özsu. “Müsterih olun, yargı değişmedi 25.09.2011, Radikal 2,

²⁴ Vahap Coşkun. “Turkey’s Illiberal Judiciary: Cases and Decisions.” *Insight Turkey* (2010) 12, 4: 43-67.

to be the civil/political wing of the PKK, began. Within the parameters of the Democratic Society Congress (KCK) case, around 2000 politicians, locally elected representatives, and human rights activists have been detained.²⁵ The length of pre-trial detentions, the lack of detailed accounts of the reasons for detention, and arrests instead of judicial supervision have raised doubts that these measures are only a form of intimidation. Moreover, the head of the executive branch, Prime Minister Erdoğan, stated after a new wave of arrests: “As a prime minister, I support the [anti] KCK operations. You can see how so many things have come out in the open during this operation that was undertaken [to protect] our national unity and fraternity.”²⁶ In such an atmosphere, it is clear that judges and attorneys, whose appointments and promotions are centrally planned, would be intimidated as well.

The lack of knowledge concerning international law, political pressure, and the social problems of the profession drive judges to make narrow interpretations. Another reason that relates to all of these and exacerbates the effects of these problems is the conceptualization of freedom of speech in Turkey, and how it is positioned as countering the state. As far as opinions contain any criticism of the state, particularly as regards the “delicate” issues of that particular time, whether they are about Kurds or Armenians, or the unity and superiority of the state, they are perceived to be a threat by decision-makers, and thus deserving of punishment. The next section summarizes how, over the years, this mindset has developed.

IV. Conceptualization of Freedom of Speech in Turkey

Decision makers’ perceptions of the state as a superior institution in need of protection have shaped the practice of governing free speech in Turkey. State officials, military personnel, and judges, basically all authorities, have seen themselves as the protectors of this strong but somehow fragile system, and any type of opposition, even if just on the level of critique, has been met with suppression.

Undoubtedly, throughout the country’s nearly 90-year history there have been numerous factors impacting conceptualizations of freedom of speech, and the roles of political actors in the Turkish political system have changed over time. However, there has been a continuity of perceived threats to the “unity” and “indivisibility” of the state. Foremost, minorities have been seen as a threat, most significantly the Kurds, followed by, especially

²⁵ 23 EU 2011, “Commission of the European Communities 2003 Regular Report on Turkey’s Progress Towards Accession”. Accessed November 27, 2011. http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/tr_rapport_2011_en.pdf.

²⁶ *Turkish Daily News*, November 23, 2011.

in the late Ottoman times, non-Muslim minority subjects, particularly the Armenians.²⁷ The second perceived threat to the state was anti-secular movements. Secularism was one of the constitutive elements of the Turkish state and any attempts to change the understanding of secularism were viewed as destabilizing. Other ideologies were seen as threats as well, as witnessed during the years of the Cold War when Turkey comprised a buffer zone between the communist Soviet Union and the capitalist West, a period when leftists in Turkey were perceived as posing the gravest threat to the nation. The gravity of these threats and the priority with which they were countered underwent changes according to the internal and external developments of the time, yet freedom of speech was always to be sacrificed if its exercise threatened the stable unity of the country.

From the 1920s to the transition to a multi-party system in 1946, the young republic sought to build an autonomous nation-state from the remnants of a multiethnic, multiconfessional empire. The general atmosphere of the period, marked by increasing fascism in Europe, contributed to policies of suppression and the young state was shaped as a heavy-handed institution that severely punished opposition.

In the 1960s and 1970s, on the one hand, cultural conservatives came into power and it became clear that the strong secularism that was espoused by the founders was not fully embraced by society; on the other hand, the global influence of liberalization affected Turkish society and civil society became quite active. Leftist, anti-secularist and minority opposition were perceived to be the main threats during this period and any acts conducted in support of these were to be suppressed, even if they were mere expressions of the freedom of speech.

The radical polarization of society coupled with international developments led to the 1980 military coup which tightened the state's control over society and left no room for freedom of speech. Under military rule, neither individual nor political liberties could be exercised and it was only in 1987 when 30,000 political prisoners were released that the country began returning to a state of normalcy. The turbulent 1990s witnessed the cobbling together of coalition governments which sought the military's help in dealing with the Kurdish uprisings, and the suppression of human rights was wartime in scope. During these years, the perceived threat was double fold, including both the Kurds and the Islamists who had begun staking claims to power in the vacuum left by inept coalition governments.

From 1999 to 2005, the prospect of EU membership propelled the country into a series of rapid major changes which impacted the structure of the state. The military's strong hand in politics waned after the leader of the Kurdish terrorist organization, the PKK, was caught, yet the perception of a

²⁷ For minority issues, see Baskin Oran's works available at <http://www.baskinoran.com>.

Kurdish threat persisted, and the judiciary subsequently became empowered in the role as protector of the state as the military's clout receded, using its powers to suppress opposition.

V. 2005 to 2012: One Step Forward, Two Steps Back

The poor record of freedom of speech in Turkey from 2005 to 2012 was the result of a complex number of forces at play in the political scene. First and foremost, in 2005 the EU accession negotiations were launched. Since the 1960s, full membership in the EU had been a goal, and the start of accession negotiations, which entailed the transposition of all EU laws into the Turkish system (adoption of the *acquis communautaire*), meant that both a significant aim had been achieved and that an arduous process of technocratic interaction with Europe had to be undertaken to adopt European standards. The second critical moment occurred when the PKK took up arms again and peace in the southeast crumbled. As the PKK carried out attacks, the military vocally criticized those EU reforms which restricted armed intervention in the region. The Chief of Staff declared that the "Turkish Armed Forces would continue its war against the PKK despite its restricted powers."²⁸ The government was prompt to respond to the military's demands, and the Anti-terror Law was amended to include a more comprehensive definition of terrorism. As seen in earlier approaches to freedom of speech, perceived threats of terrorism resulted in a limiting of the freedom of speech and paved the way for the suppression of liberties. The EU progress report for 2006 rightfully cautioned that the freedom of the press and media could be undermined by provisions which allowed for the suspension of periodicals and which rendered chief editors, and press and media owners, liable for the publishing of material deemed terrorist propaganda or in support of terrorist activities.²⁹ The number of journalists, authors, and editors on trial rose from 157 in 2005 to 293 in 2006.³⁰

Moreover, the 2007 presidential elections renewed discussions concerning the constitutive issue of secularism. Clashes between the conservative Justice and Development Party (AKP) the secularist Republican People's Party (CHP) increased, with secularists feeling that they were losing ground to religious conservatives who, in their eyes, upheld ideologies that were in stark

²⁸ *Hürriyet*, 6 August 2005.

²⁹ EU 2006, "European Commission Turkey 2006 Progress Report (SEC 2006) 1426". Accessed August 21, 2011 http://ec.europa.eu/enlargement/archives/pdf/key_documents/2006/package/sec_1426_final_progress_report_tr_en.pdf.

³⁰ Erol Önderoğlu and Emir Celik, 2010, "Terörle Mücadele Yasası 2010'da Başrolde (Anti-Terror Law Taking the Center Stage in 2010)" available from <http://www.bianet.org/bianet/ifade-ozgurlugu/128849-terorle-mucadele-yasasi-2010da-basrolde> accessed 21 August 2011.

contrast to the founding fathers' conceptualizations of secularism. Moreover, with the military's powers largely cut back, some secularists feared that the secular state lacked a protector. In spite of these criticisms, during the 2007 general elections the AKP won yet another landslide victory and initiated moves that would fuel secularists' concerns, such as prioritizing the headscarf issue over redrafting the constitution.

In addition to the debate over secularism, which was basically a clash over whether the traditional elite of the CHP or the new elite of the conservatives would hold more sway over decision-making mechanisms, the rights of minorities took center stage as a critical issue. Despite its failings, the reform process had contributed to a more open discussion about the situation of minorities in Turkey. A conference titled "Ottoman Armenians during the collapse of the Empire: Scientific Responsibility and Issues of Democracy" was held in September of 2005, after much discussion and hostile commentary from the Minister of Justice at the time, Cemil Çiçek.³¹ The Turkish Publishers Association reported in 2005 that the publication of books related to sensitive issues, such as the Kurdish and Armenian questions, was easier than in the past.³² However, pressure on journalists was ongoing, and Hrant Dink, the editor of the Armenian newspaper *Agos* who was on trial for a number of criminal charges under Article 301 for "denigrating Turkishness," was assassinated in 2007.

Another major development in the Turkish political scene has been the Ergenekon case. In June 2007, the Turkish police found a cache of hand grenades on the roof of an apartment in a low-income Istanbul neighborhood. The weapons belonged to retired members of the military, and it was claimed that grenades with adjacent serial numbers had been used in an attack on the offices of the newspaper *Cumhuriyet*, a staunchly secular establishment. Alparslan Arslan, the young lawyer who launched the attack, also killed a senior judge because of a head-scarf case, which resulted in the protest of secularists who accused the ruling Justice and Development (AKP) Party of inciting violence. The Ergenekon case broke in the press over the apparent controversy of this incident. Ergenekon is argued to be a clandestine organization with strong ties to the military which acts as a "deep state" trying to govern the country as it pleases. By 2010, a total of 270 people, including 116 military officers and 6 journalists, had been charged with attempting to

³¹ Cemil Çiçek accused the organizers of the conference of "stabbing the nation in its back" which placed a great amount of pressure on the state university where the conference was going to take place; the conference was postponed, and was later held at a private university.

³² EU 2005. "European Commission Turkey 2005 Progress Report (SEC 2005) 1426". Accessed August 21, 2011.

overthrow the government and instigate armed riots.³³ The trial took an odd turn, however, with the arrests of the journalists Nedim Şener and Ahmet Şık in March of 2011. They were arrested on claims that they were members of the Ergenekon organization. These arguments cast doubt on the soundness of the Ergenekon case, since the type of reporting that they engaged in made it highly unlikely that they really were members of the organization. Nedim Şener had investigated the assassination of Hrant Dink, arguing that there were links between the suspects of the Dink and Ergenekon cases, and Ahmet Şık's unpublished book manuscript explored the intricate connections within the deep state. Another concern about the Ergenekon case is that the time between arrests and the presentation of indictments to the court is often quite drawn out, raising doubts about whether the arrests have been based on substantial evidence or whether people have been arrested merely as part of the investigation.

In this atmosphere marked by deep mistrust between sectors of society split over the issue of secularism and between political actors disgruntled over the sharing of power, in addition to doubts about the effectiveness of the judicial system, the exercise of freedom of speech has been especially difficult. Despite the EU's persistent calls to relieve pressure on journalists and authors, activists continue to be tried, and are usually convicted.

Another development that cannot be dismissed in talking about the current status of free speech in Turkey is bans on websites. Such bans are frequent in Turkey, the most visible example of which was the banning of YouTube, which was officially inaccessible in Turkey from May 2008 to November 2010, after the publication of videos which allegedly violated the Law on Crimes against Atatürk.³⁴ There are other ongoing court cases against the video-sharing website, as well as other mainstream web portals. The Law on Internet Content (Law No. 5651 on the Regulation of Publications on the Internet and Suppression of Crimes Committed by Means of Such Publications) is not in line with international standards.³⁵ Under Article 8 of this law, access to websites can be blocked if there are sufficient reasons for "suspicion" that certain crimes defined in the Turkish Criminal Code have been committed via the internet. These crimes include incitement to suicide, sexual exploitation and abuse of children, facilitation of the use of drugs, obscenity and prostitution, as well as crimes against Atatürk.³⁶ As of May 27, 2011, 13,074 websites were blocked, including news sites focusing primarily

³³ EU 2010, "European Commission Turkey 2010 Progress Report (SEC 2010) 1327". Accessed August 21, 2011 http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/tr_rapport_2010_en.pdf.

³⁴ Ibid, 21.

³⁵ Ibid, 56.

³⁶ Hammamberg Report 2011, crimes against Atatürk are proscribed by Act No. 5816.

on the Kurdish issue, such as *Özgür Gündem*, *Keditor*, and *Günlük Gazetesi*, as well as websites comprising the online gay community in Turkey, which has approximately 225,000 users.³⁷ (The range of “crimes” used to justify the ban of websites, from defaming Atatürk to reporting or commenting on the Kurdish issue, indicates that the perceived threats have not changed.

These internet bans point to new perceived threats as well. “Family Peace and Welfare” became an issue which authorities declared was in need of protection, according to a by-law that was issued by the Turkish government in November of 2007. A contentious topic in the summer months of 2011 was the government’s proposed plan of internet filtering, the conditions of which were to be stipulated by the authorities. The Information Technologies and Communication Authority (BTK) decided that all internet users in Turkey would be required to choose one of four internet filtering packages, which would block certain websites.³⁸ The fact that the filtering criteria would not be made public raised concerns about who would decide on whose behalf about the type of filtering and the amount of censorship. When the Turkish Industrialists’ Association’s (TUSIAD) president, Ümit Boyner, criticized the bans, the powerful Deputy Prime Minister Bülent Arınç retorted, “If Ms. Boyner and those who share her sentiments come to power, they can liberalize porn sites as well as sites that propagate violence and describe killing.”³⁹ His use of derogatory terms alarmed women’s groups and served as a reminder of the secular-conservative divide in Turkey.

The period starting in 2005 did not bring any positive changes to the way that threats were perceived by decision makers. Conversely, in fact, the increasingly polarized nature of society has led to a more limited understanding of free speech. Freedom of speech has become an arena of conflict which reflects the political power struggles underway among various state and non-state actors, with the end result being that those in possession of power have been able to restrict the freedom of individuals and groups who do not have access to, or have been disenfranchised of, the power to resist.

VII. Conclusion

Even though Turkey is a signatory to the relevant international conventions, and the Turkish Constitution recognizes the superiority of international law over domestic judicial rulings, the right to free expression and the freedom of the press have been severely curtailed.

³⁷ Hammarberg Report, 2011.

³⁸ *Hürriyet Daily News*, 18 May 2011.

³⁹ *Hürriyet Daily News*, 27 May 2011.

This chapter explored the reasons for Turkey's poor record concerning freedom of speech, arguing that the professional problems of the judiciary, such as a lack of foreign language skills and the effects of their sociopolitical environment, the disharmony of laws brought about by the fact that they were reformed without true liberalization in mind, and decision-makers' perception of the state as a superior institution in need of protection have shaped the practice of governing free speech in Turkey.

The first section explained how, in particular, the Anti-terror Law and Criminal Law have been used to punish acts of free speech. The Anti-terror Law and the Criminal Code set into place articles that were sufficiently vaguely worded to leave them open to political interpretation, with the aim of ensuring that freedom of speech could be curtailed if perceived as a threat.

The second section discussed difficulties arising from interpretation of laws and focused on how, despite significant legal changes, especially those implemented since 1999 with the ostensible goal of improving protection of the freedom of speech, laws have provided prosecutors and judges with numerous laws that can be used to suit their own agendas. Such laws have been utilized to expedite trials and the handing down of sentences, and governments and legislative bodies have not abstained from adding amendments that turned back the clock and imposed more restrictive provisions. Furthermore, decision makers' perceptions of the existence of threats have led to various forms of suppression.

Freedom of speech constitutes the very basis of many other rights, and its violation is a serious offence of human rights. Its protection rests not only in laws but also in the minds of those who create, apply, and live by those laws. Therefore it is particularly critical to evaluate how freedom of speech is perceived by those who hold decision-making powers in a country. Since decision-makers are also citizens, further studies may look into how various decision-makers perceive freedom of speech. Moreover, attitudes towards freedom of speech can change over time, and under different international and domestic influences. A longitudinal analysis that takes into consideration the interplay between the international and domestic forces at play, such as this study has attempted to do, may provide guidance for working towards the improvement of human rights as a whole.

Forging Ahead: A Contemporary Review of Egyptian Press and Media Laws

BRENDA F. ABDELALL¹

I. Introduction

Arab nations are bound together through a common language and cultural heritage that enrich their respective societies. However, many Arab nations also share an absence of the essential building blocks of democracy. Specifically, restrictive government intervention and regulations of the media impairs the ability of the people to engage in a free exchange of ideas essential to any functioning democracy. Indeed, freedom of opinion and expression is “perhaps one of the least respected human rights in the Arab world today, regardless of relevant constitutional provisions in each country.”² Further, in much of the Arab world, the media has been recruited into a national enterprise for the production of state propaganda.³ Radio and television are under direct government control, and, in some circumstances, function as a means for the government to “promote their political, religious, cultural, and eco-

¹ Special thanks to Lee Ann Tucker and William Kent, law clerks to the Egyptian American Rule of Law Association, as well as Vladislav Maksimov and Alexandre Bagot, undergraduate students at New York University Abu Dhabi, for their excellent research assistance.

² Amira Abdel Fatah, *Freedom of the Press in Egypt*, ARABIC NETWORK FOR HUMAN RIGHTS INFO. (ANHRI) (2008), <http://www.anhri.net/en/reports/pressfreedom/>.

³ Hussein Amin, *Freedom as a value in Arab Media: Perceptions and Attitudes Among Journalists*, 19 POLITICAL COMM. 125 (2002) (article presented March 2001 at Berlin conference on “The Ethics of Journalism: Comparison and Transformations in the Islamic-Western Context”).

nomic programs,” filtering what the general population can hear and see.⁴ This is particularly true in Egypt, which is the subject of this chapter.

With the eyes of the world on Egypt in early 2011, the revolution laid bare, in real time, how the state used restrictions on press freedom to cement control. Not just in Egypt, but individuals across the Arab world began to demand accountability from their corrupt regimes encumbered by dysfunctional bureaucracies. The authoritarian regimes became a symbol for the dormant nature of the Arab world; the growing economic and social disparities, and the lack of freedoms when compared to the West. While the former President Hosni Mubarak’s regime disintegrated under the weight of the 2011 revolution, the legal framework that limits the freedom of press and discourse in Egypt remains intact several years later.

This chapter explores that framework, and the need for corresponding reforms, in Egypt. This chapter also provides a contemporary review of freedom of the press standards in Egypt, beginning with an overview of the relevant Egyptian constitutional provisions and revisions, which include not only explicit rights to freedom of the press and expression, but explicitly prohibit censorship. The chapter then highlights the problematic legal framework that currently inhibits constitutionally guaranteed freedoms from flourishing.

II. Egyptian Constitutional Protections

A. Key Protections under Egypt’s 1971 Constitution

Historically, the Egyptian Constitution explicitly protected freedom of speech, but this right is, and has been, limited by other constitutional provisions. This ambiguity has allowed the Egyptian government to circumvent and abuse the right to a free press. Under the Permanent Constitution of 1971 (1971 Constitution), Egypt was, as it is now, a presidential republic, which guarantees the rights of individuals under a democratic, socialist state. The 1971 constitution outlined the basic structure and functions of the state, and defined public freedoms and obligations. Article 207 guaranteed freedom of the press, stating in part: “The Press shall exercise its true vocation freely and independently in the service of society through all means of expression.”⁵ Article 208 went on to state: “The freedom of the press is guaranteed and press censorship is forbidden. It is also forbidden to threaten, confiscate

⁴ *Id.* (citing Y. Kamalipour & H. Mowlana, *Mass Media and the Middle East: A Comprehensive Handbook* (1994)).

⁵ Constitution of the Arab Republic of Egypt, 11 September 1971, Art. 207 (as amended 22 May 1980, 25 May 2005, and 26 March 2007).

or cancel a newspaper through administrative measures, as stipulated in the Constitution and defined by law.”⁶

Article 48, entitled “Sovereignty of Press,” reiterated the guarantee of freedom of the press and the censorship ban. In particular, it stated:

Freedom of the press, printing, publication and mass media shall be guaranteed. Censorship on newspapers is forbidden as well as notifying, suspending or canceling them by administrative methods. In a state of emergency or in time of war a limited censorship may be imposed on the newspapers, publications and mass media in matters related to public safety or purposes of national security in accordance with the law.⁷

The 1971 Constitution also explicitly protected freedom of expression. Article 47 allowed individuals to express their opinion and “to publicize it verbally or in writing or by photography or by other means within the limits of the law.”⁸ The 1971 Constitution recognized that “self-criticism and constructive criticism” are necessary for the “safety of the national structure.”⁹ Additionally, although not elaborated upon in the Constitution, journalists also had “the right to obtain news and information.”¹⁰

B. Key Protections under Egypt’s 2012 Constitution

After the Egyptian Revolution of 2011, the elected president Mohammed Morsi signed into law a new controversial constitution¹¹ in December 2012.¹² The 2012 Constitution explicitly protected in Article 45 the freedom of thought and opinion, including those to “express...opinion[s] in speaking, writing, image, or otherwise.”¹³ Moreover, Article 48 expressly protected the freedoms of “journalism, the press” to serve as an independent messenger in “expressing, forming, and directing public opinion.”¹⁴ Furthermore, Article 48

⁶ *Id.* at Art. 208.

⁷ *Id.* at Art. 48.

⁸ *Id.* at Art. 47.

⁹ *Id.*

¹⁰ Constitution of the Arab Republic of Egypt, 11 September 1971, Art. 201: “according to the regulations set by law.”

¹¹ Constitution of the Arab Republic of Egypt, 2012, translated by Nivien Saleh *available at* <http://niviensaleh.info/constitution-egypt-2012-translation/>.

¹² “Egyptian Constitution ‘approved’ *BBC News*. *available at* <http://www.bbc.com/news/world-middle-east-20829911>.

¹³ Constitution of the Arab Republic of Egypt, 26 December 2012, Art. 45.

¹⁴ *Id.* at Art. 48.

“forb[ade] to censor the material” published by the media.¹⁵ The only exception provided was “in times of war or public mobilization.”

Additionally, Article 49 guaranteed “the right to issue and own newspapers” to any Egyptian “that provides notification.”¹⁶ The Constitution did not stipulate what kind of notification must be provided to the relevant government agency.¹⁷

Further, Articles 215 and 216 established the National Media Council and the National Body for the Press and the Media, which jointly were given the task to organize the affairs of various forms of media, public and private, respectively.¹⁸ The National Media Council was also trusted with “preserv[ing] the pluralism of the media, preventing their concentration or monopolization, and ... protect[ing] the interests of the public.”¹⁹

Finally, the Preamble of the Constitution declared the adherence to principles of “freedom of thought, creativity, [and] opinion,” and provided for freedoms to both the media and journalists.²⁰

C. Key Protections under Egypt's 2014 Constitution

Following former President Morsi's ouster, the 2012 Constitution was suspended by the Egyptian military until new elections could be held.²¹ In January 2014, following a two-day referendum, a new Constitution²² passed. More than twenty million Egyptians participated in the referendum, and 98.1 percent voted in favor of the new Constitution.²³ Conforming with the principles of previous constitutions, the 2014 Constitution guarantees the “freedom of the press, printing and paper, visual, audio and electronic publication.”²⁴ Furthermore, Article 70 proclaims the right to “own and issue newspapers and establish visual, audio and digital media outlets.”²⁵ Importantly, however,

¹⁵ *Id.* at Art. 48.

¹⁶ *Id.* at Art. 49.

¹⁷ *Id.* at Art. 49.

¹⁸ *Id.* at Art. 215 and 216.

¹⁹ *Id.* at Art. 215.

²⁰ Constitution of the Arab Republic of Egypt, 26 December 2012, Preamble.

²¹ Hauslohner, Abigail, William Booth, and Sharaf Al-Hourani. “Egyptian Military Ousts Morsi, Suspends Constitution.” *Washington Post*. The Washington Post, 04 July 2013. Web. 26 May 2014.

²² Constitution of the Arab Republic of Egypt, 2014, Unofficial Translation. *Egypt State Information Service* available at <http://www.sis.gov.eg/Newvr/Dustor-en001.pdf>.

²³ Al Jazeera. “Egypt Constitution Approved by 98.1 Percent.” *Al Jazeera*. 24 January 2014. Web. 26 May 2014.

²⁴ Constitution of the Arab Republic of Egypt, 18 January 2014, Art. 70.

²⁵ *Id.* at Art. 70.

the same Article requires that a “notification...[be] given as regulated by Law,” and “the Law shall regulate the procedures of establishing and owning visual and radio broadcast stations and online newspapers.” Nevertheless, Article 71 expressly prohibits to “censor, confiscate, suspend or shut down Egyptian newspapers and media outlets in any way,” with exceptions being “times of war or general mobilization.”²⁶ The 2014 Constitution also forbids the imposition of “freedom restricting penalty ... for publication and publicity crimes,” adding that penalties for “crimes related to incitement of violence, discrimination between citizens, or impingement of individual honor” will be as stipulated by Law.²⁷

Sovereignty of the press is ensured by Article 72, which states:

The State shall ensure the independence of all State-owned press institutions and media outlets, in a manner ensuring their neutrality and presentation of all political and intellectual opinions and trends as well as social interests and also guaranteeing equality and equal opportunities in addressing public opinion.²⁸

Further, Chapter Ten of the 2014 Constitution proclaims the establishment of the Supreme Council for the Regulation of Media, National Press Organization and National Media Organization. The Supreme Council is entrusted with the:

[R]esponsibility for guaranteeing and protecting the freedom of press and media as stipulated in the Constitution ... and developing the controls and criteria necessary to ensure compliance by the press and media outlets with the professional and ethical standards, and national security needs as stated in the Law.²⁹

Finally, Article 226, concerning Amendments, states that “texts pertaining to ... the principles of freedom ... may not be amended, unless the amendment brings more guarantees,” thus ensuring that personal, as well as press and media freedoms, will remain inviolable.³⁰

The 2014 Constitution expressly prohibits any form of censorship and harassment of the press and media outlets. The current version is a step in the right direction, as the Egyptian Constitution provides for a considerably broader scope of constitutional protections for the press.

²⁶ *Id.* at Art. 71.

²⁷ *Id.* at Art. 71.

²⁸ *Id.* at Art. 72.

²⁹ *Id.* at Art. 211- 213.

³⁰ Constitution of the Arab Republic of Egypt, 18 January 2014, Art. 226.

III. Laws Impacting Press and Media Freedoms

A. Emergency Law No. 162 of 1958

Despite these constitutional protections, between 1981 and 2012, Egypt was governed under Emergency Law No. 162 of 1958, granting Egyptian authorities the power to suspend basic freedoms guaranteed by the Constitution. As stated in Article 48 of the 1948 Constitution, a “state of emergency” allowed the government to censor a variety of publications.³¹ More specifically, Article 3 of the Emergency Law provided that the president may:

Order a censorship on correspondence of all kinds, as well as on newspapers, publications, drawings and all means of expression and advertising before they are published; order their confiscation or suspension or shut down printing houses provided that the censorship is applied to matters related to public peace or national security.³²

Although much has been written about the constitutionality of the state of emergency in Egypt, its abuse by the Egyptian government has been certain. This provision allowed the government to stifle constitutionally guaranteed freedoms, including freedom of the press, for nearly thirty years.³³ As a result, government authorities repeatedly harassed or detained journalists, subjecting them to trials by military tribunals under the guise of the Emergency Law.³⁴

In considering the state of press freedom in Egypt, the relationship between the Egyptian Penal Code and the Emergency Law should not be overlooked. Under a variety of pretexts, directly or indirectly related to notions of “state security” or “defamation,” the Egyptian government has used this controversial law to subject journalists to significant penalties, including imprisonment and military trial. The Emergency Law allowed the government to use the Penal Code to punish journalists for the defamation of public officials or heads of state, and for the dissemination of “false or exaggerated infor-

³¹ Mendel, Toby. “Political and Media Transitions in Egypt: A Snapshot of Media Policy and Regulatory Environment.” *University of Minnesota*. Internews, Aug. 2011. http://www1.umn.edu/humanrts/research/Egypt/Internews_Egypt_MediaLawReview_Aug11.pdf

³² Rasha Allam, “Media Landscapes, Egypt,” *European Journalism Centre*, http://ejc.net/media_landscapes/egypt.

³³ Committee to Protect Journalists, “Attacks on the Press 2001: Egypt,” 26 March 2002, <http://cpj.org/2002/03/attacks-on-the-press-2001-egypt.php>.

³⁴ *Id.*

mation” considered contrary to state dignity.³⁵ The Emergency Law coupled with the Penal Code had a significant chilling effect on the press and media in Egypt, effectively hampering freedom of expression and limiting the amount of information received by the Egyptian public.

Shortly after the fall of former President Mubarak’s regime, a constitutional referendum was held in March 2011. The successful referendum included a provision modifying Article 148 of the Egyptian Constitution, allowing the president of Egypt to declare a state of emergency. However, the amendment imposed new restrictions upon the president, including a requirement that the majority of members of the People’s Assembly (the Egyptian parliament) declare a state of emergency, with a maximum period of six months.³⁶ Additionally, any renewal of the state of emergency would require a popular referendum.³⁷

In June 2012, the infamous Emergency Law expired.³⁸ Human rights activists and citizens of Egypt alike hailed the expiration of the law, which signaled that security forces were no longer above the law, and that everyone would have to abide by existing legislation. Although the law was widely viewed as a symbol of the extraordinary police power in Egypt, its expiration alone has not changed the landscape in Egypt with regard to press freedoms.

B. The “Press Assassination Law” and Press Law of 1996

In 1995, the Egyptian Parliament passed Press Law 93 of 1995, known as the “Press Assassination” Law. It was passed on 27 May 1995, and President Mubarak swiftly signed the law that evening, with an announcement that “press freedom threatens democracy,” and that the law addresses “the weakness of the penalties prescribed in the penal code,” and the “unconstitutionality of privileging journalists and writers.”³⁹ Press Law 93 of 1995 called for the

³⁵ Hussein Amin, “Freedom as a Value in Arab Media: Perceptions and Attitudes among Journalists,” *Political Communication* 19.2 (2002): 130.

³⁶ Michele Dunne, “Overview of Egypt’s Constitutional Referendum,” Carnegie Endowment for International Peace, 16 March 2011.

³⁷ *Id.*

³⁸ Ernesto Londono, “Egypt’s Infamous Emergency Law Expires,” *Washington Post*, 1 June 2012, http://www.washingtonpost.com/world/middle_east/egypts-infamous-emergency-law-expires/2012/05/31/gJQAWqqQ5U_story.html.

³⁹ Amira Abdel Fattah Hussein, “Press and Publishing Legislation in Egypt: Restricting Freedoms through Legislation” (Chapter 2 of “Press Freedom in Egypt,” MA thesis, The American University in Cairo [2008]), made available by the Arabic Network for Human Rights Information (2010), <http://www.anhri.net/en/reports/pressfreedom/06.shtml>.

imprisonment and imposition of fines on journalists who commit offenses, such as a 15-year sentence if convicted of libel.⁴⁰

Following an outcry by human rights groups and journalists alike, the parliament issued Press Law 96 of 1996 to narrow the restrictions set out in its predecessor. However, Press Law 96 did not overcome the significant obstacles to freedoms of the press and speech. Press Law 96 contains a number of troubling provisions, most importantly Article 4, which allows the state to take control of the press during a “state of emergency.” As stated above, for nearly 30 years, Egypt has been operating under a “state of emergency,” thus giving the government permission under Article 4 to control and direct media activities.

Journalists have also been forced to practice self-censorship under Articles 21 and 22 of Press Law 96, which restrict journalists from “attacking the private life of citizens,” “religious faith,” or to deal “with the conduct or function of a public person.”⁴¹ Although vague in terminology, a violation would subject a journalist to one year of prison.⁴² A member of the Higher Council of the Journalists Syndicate, Gamal Fahmi, described Press Law 96 as “freedom based on the whim of the government” which could “open their drawer and pick whatever offense they feel like and throw the journalist in jail.”⁴³ Fahmi himself spent six months in jail in 1998 for “defaming” the then deputy of the upper house of parliament.⁴⁴ Many journalists across Egypt have called for the abolishment of publishing laws requiring imprisonment. Indeed, even the failure to publish a correction of a false statement or fact could lead to a minimum of three months imprisonment under Article 28 of Press Law 96.⁴⁵

In September 2013, Ahmed Abu Deraa, an Egyptian journalist working for *Al Masry-Al Youm*, was detained for one month and given a six-month delayed prison sentence as well as a monetary fine for “intentionally spreading

⁴⁰ Yasmine Fathi, “Mouths Wide Shut: Publishing Laws Threaten Journalists,” *Al Ahram Online*, 18 December 2010, <http://english.ahram.org.eg/NewsContent-Print/1/0/2140/Egypt/0/Mouths-wide-shut-Publishing-laws-threaten-journali.aspx>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ “Egyptian Editor Jailed for ‘False Information,’” *The National*, 28 September 2008, <http://www.thenational.ae/news/world/africa/egyptian-editor-jailed-for-false-information>.

⁴⁵ Amira Abdel Fattah Hussein, “Press and Publishing Legislation in Egypt: Restricting Freedoms through Legislation” (Chapter 2 of “Press Freedom in Egypt,” MA thesis, The American University in Cairo [2008]), made available by the Arabic Network for Human Rights Information (2010), <http://www.anhri.net/en/reports/pressfreedom/06.shtml>.

false information about the military.”⁴⁶ Mohamed Fahmy, Baher Mohamed, and Peter Grete, three journalists working for Al Jazeera, were jailed in December 2013, “accused of smearing Egypt’s reputation, doctoring footage and aiding terrorists,” and Abdullah Elshamy, a fourth colleague, was jailed in August 2013 under no charges whatsoever.⁴⁷ All four remain in custody in 2014.

In August 2012, former Vice President Mahmoud Mekki had stated that the Justice Department was “working on a framework for the establishment of an independent body to oversee media practices,” giving hope for improvement in media rights.⁴⁸ But in early May 2014, before being elected, current President Abdel Fattah El-Sisi told newspaper editors “not to cover freedom-of-speech issues or press for other democratic reforms, as such actions could lead to protests that jeopardize national security,” giving citizens reason to believe that there will be little progress in the near future with regard to press freedoms.⁴⁹ Indeed, in late May 2014, a day before the Presidential elections began, Professor Nader Al-Fergany was banned from publishing in Al-Ahram because of his general tendency to criticize Al-Sisi and the current regime.⁵⁰

C. Penal Code Provisions

Egypt’s archaic Penal Code contains a number of provisions with a direct impact on journalists. The Penal Code is essentially a toolkit for repression of the media and continues to stifle freedom of the press in Egypt. Most troubling is Article 102, which calls for the detention of anyone who deliberately diffuses news or information that “disturbs public security, spreads

⁴⁶ Rana Muhammad Taha, “Abu Deraa gets suspended prison verdict,” *Daily News Egypt*, 05 October 2013, <http://www.dailynewsegypt.com/2013/10/05/abu-deraa-gets-suspended-prison-verdict/>.

⁴⁷ Patrick Kingsley, “Jailed Al-Jazeera Journalist given Press Freedom Prize as Trial Resumes in Egypt,” *Theguardian.com*. Guardian News and Media, 02 May 2014 <http://www.theguardian.com/world/2014/may/02/al-jazeera-journalist-press-freedom-award-egypt-mohamed-fahmy>.

⁴⁸ Basil El-Dabh, “Vice President confirms overhauling media law,” *Daily News Egypt*, 27 August 2012, <http://www.dailynewsegypt.com/2012/08/27/vice-president-confirms-overhauling-media-law/>.

⁴⁹ “Egypt’s Sisi tells media not to push for democratic reforms,” *Al Jazeera America*, 08 May 2014, <http://america.aljazeera.com/articles/2014/5/8/egypt-s-sisi-tellsmedianotto push freedoms.html>.

⁵⁰ Arabic Network for Human Rights Information, “Egypt: Further Attacks on Press Freedom – Writer “Nader Al-Fergany” Banned From Writing at Al-Ahram,” *All Africa*, 28 May 2014, <http://allafrica.com/stories/201405291441.html>.

horror among the people, or causes harm or damage to the public interest.”⁵¹ Although no minimum or maximum sentence is listed, journalists are subject to detention based on the *impact* of their reporting and not solely its content.

Additionally, a number of Penal Code provisions penalize journalists for “affronting the President of the Republic” (Article 178) or for “vilifying” (Article 181) or “insulting a foreign king or head of state” (Article 180) as well as “foreign diplomats” (Article 182). These provisions significantly hamper journalists’ ability to accurately report on foreign or domestic affairs because of the risk of detention.

Even the *potential* to disturb public order is punishable. Article 188 of the Penal Code calls for imprisonment for a maximum of one year for any person who “makes public—with malicious intent—false news, statements or rumors that [are] likely to disturb public order.” Ibrahim Eissa, a popular Egyptian newspaper editor, was charged in March 2008 under Article 188 for publishing a report suggesting that then-President Mubarak’s health was deteriorating.⁵² Although he received a six-month prison sentence, an appeals court later reduced the sentence to two months. Ultimately, and ironically, he received a presidential pardon.⁵³

When SCAF was recently in control of Egypt, a blogger, Maikel Nabil, was sentenced to three years in prison by a military court under Article 184 of the Egyptian Penal Code, for “insulting the military establishment.”⁵⁴ After an increase in international pressure, he was released after spending nearly 10 months in prison.⁵⁵

The Penal Code also contains provisions inhibiting religious expression. In particular, Article 98(f) punishes “whoever exploits religion in order to promote extremist ideologies by word of mouth or in any other manner, with a view to stirring up sedition, disparaging or contempt of any divine religion or its adherents, or prejudicing national unity.”⁵⁶ In 2012, a prominent businessman, Naguib Sawiris, was put on trial for tweeting cartoons of

⁵¹ Human Rights Watch, “Egypt: Journalists Still Risk Jail under Press Law,” 10 July 2006, <http://www.hrw.org/en/news/2006/07/10/egypt-journalists-still-risk-jail-under-press-law>.

⁵² Amnesty International, “Egypt: Newspaper Editor’s Prosecution Part of a ‘Pattern of Harassment’ of Egyptian Media,” 27 March 2008, <http://www.amnesty.org/en/for-media/press-releases/egypt-newspaper-editor-s-prosecution-part-pattern-harassment-egyptian>.

⁵³ Amnesty International, “Egyptian Court Overturns Journalists’ Prison Sentences,” 2 February 2009, <http://www.amnesty.org/en/news-and-updates/good-news/egyptian-court-overturns-journalists-prison-sentences-20090202>.

⁵⁴ Human Rights Watch, “Egypt: A Year of Attacks on Free Expression,” 11 February 2012, <http://www.hrw.org/news/2012/02/11/egypt-year-attacks-free-expression>.

⁵⁵ *Id.*

⁵⁶ *Id.*

Mickey Mouse and Minnie Mouse in traditional Islamic dress.⁵⁷ Although trial was set for January 2012, and later postponed, mounting pressure regarding the case being an “attack on Coptic Christians” ultimately led to the case being dismissed.⁵⁸ However, the Penal Code provision remains in place.

The Penal Code fundamentally disregards international standards of freedom of speech and expression. Egypt is a signatory to the United Nations’ International Covenant on Civil and Political Rights (ICCPR), which stipulates that “everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”⁵⁹ Nonetheless, the Penal Code provisions run contrary to this standard, significantly hampering the dissemination of information to Egyptian citizens, and leading to self-censorship by journalists.

In 2004, President Mubarak pledged that the government would amend the Penal Code and other similar provisions to ensure that journalists would not go to prison solely for their writings.⁶⁰ The then–Minister of Information, Safwat Al Sherif, delivered a speech to the Journalists Syndicate on behalf of President Mubarak in 2004 recognizing “continuous bias to the freedom of the press and its independence, and [that] non-interference in its internal affairs is a deeply-rooted belief and a constant fact.”⁶¹ Journalists waited nearly two years for President Mubarak and the National Assembly to act on this “promise” to no longer imprison journalists for published opinions and to amend the Penal Code.

Despite widespread protests by independent and opposition newspapers to amend the Penal Code, in 2006, the Egyptian National Assembly voted on amendments to it, but only minor changes were made. For example, the imprisonment provisions were removed from a few articles, and the revisions made were to provisions not enforced by the government.⁶² Furthermore, for some provisions, the fines were doubled. Ultimately, the National Assembly failed to meaningfully eliminate the serious impediments to freedom of the press.

⁵⁷ *Id.*

⁵⁸ “The Trial of Naguib Sawiris,” *Free Speech Debate*, 28 February 2012, <http://freespeechdebate.com/en/case/the-trial-of-naguib-sawiris/>.

⁵⁹ United Nations International Covenant on Civil and Political Rights, Art. 19, Mar. 23, 1976, 999 U.N.T.S. 171, G.A. Res. 2200A (XXI), U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966), 52, <http://www2.ohchr.org/english/law/pdf/ccpr.pdf>.

⁶⁰ Amira Abdel Fattah Hussein, “Press and Publishing Legislation in Egypt: Restricting Freedoms through Legislation” (Chapter 2 of “Press Freedom in Egypt,” MA thesis, The American University in Cairo [2008]), made available by the Arabic Network for Human Rights Information (2010), <http://www.anhri.net/en/reports/pressfreedom/06.shtml>.

⁶¹ *Id.*

⁶² *Id.*

Until the Penal Code is revised, censorship, both state-supported and self-imposed, will continue to restrict media freedom in Egypt. Thus, the provisions that permit imprisonment of journalists and penalize dissent must be repealed.

IV. Egypt's Press and Media Landscape Pre-2011 Revolution

For the past several decades, Egyptians have struggled with government regimes restricting the media and suppressing freedom of the press. These archaic tools have been historically used by Egyptian government regimes to cement control over the general populace. Both the former President Mubarak's regime and the post-Mubarak governments have systematically suppressed media freedom. This was accomplished through a system of a highly regulated and limited form of press discourse. These government regimes used tactics such as imposing an emergency law to override constitutionally granted freedoms, broad and vague "defamation" and "honor" prohibitions, increasing restrictions on press ownership and licensing, and an active use of the Penal Code to both directly censor and foster self-censorship among media professionals.

Egypt's legal framework restricting free political discourse and ensuring the government's stranglehold on media remains nearly entirely intact several years after the ouster of former President Mubarak. Egyptian media is stifled and unable to progress due to a variety of circumstances, including legal obstacles, and a weak economic base.⁶³ Nonetheless, over the past decade, access to international Arabic and non-Arabic print and broadcast media has had a significant impact on public attitudes.⁶⁴ These international media outlets have been particularly important in shaping public opinion, filling the void of sophisticated and accurate journalism in the local media arising out of restrictive government controls.

Moreover, social networking allows individuals to "assemble" in a non-traditional manner, which proved to be a pivotal factor in the 2011 revolution. Groups of individuals sharing common interest emerged on internet sites, such as Facebook, allowing them to exchange thoughts and ideas. As individuals expressed themselves through these new media outlets, a greater

⁶³ Hussein Amin, *Freedom as a value in Arab Media: Perceptions and Attitudes Among Journalists*, 19 POLITICAL COMM. 125 (2002) (article presented March 2001 at Berlin conference on "The Ethics of Journalism: Comparison and Transformations in the Islamic-Western Context").

⁶⁴ *Id.* (citing H.Y. Amin, *From Obligation to Opportunity: New Visions for the Media* (Oct. 2000) (Keynote Address delivered to the Global Fusion Conference in St. Louis, Missouri)).

sense of self-awareness developed, as did the desire for basic democratic principles, such as political participation, freedom of expression, and freedom of the press.⁶⁵

A. History of Print and Broadcast Journalism

Egypt has a broad and diverse media landscape ranging from relatively diversified and sophisticated print and broadcast media to a new and budding Internet media culture. Historically, Egypt has had an exclusively or predominantly state-owned media. As early as 1960, Egypt's president, Gamal Abdel Nasser, nationalized the Egyptian press and ownership was given to the National Union, later renamed the Arab Socialist Union.⁶⁶ Nasser's stated objective with Press Law 156 of 1960 was to liberate the press "from the control of capitalism."⁶⁷ All new papers were required to seek approval from the government, and journalists were required to obtain government-issued licenses.⁶⁸ Nasser's successor, President Anwar Sadat, adopted a more open attitude toward the press, and removed some aspects of censorship, yet retained government control of the media.⁶⁹

Under former President Hosni Mubarak's rule, the Egyptian media enjoyed a relatively higher degree of freedom. However, the Mubarak regime routinely used various legal tactics to selectively penalize and punish journalists who criticized Mubarak or his government.⁷⁰ One commentator described the Mubarak regime's attitude toward the press as "wild swings of the pendulum between repression and freedom over the past half-century."⁷¹

⁶⁵ Michael Sakbani, *The Revolutions of the Arab Spring: Are Democracy, Development and Modernity at the Gates?*, CONTEMP. ARAB AFFAIRS, Apr.-June 2011, at 127, 129.

⁶⁶ Hussein Amin, "Strengthening the Rule of Law and Integrity in the Arab World: Report on the State of the Media in Egypt," The Arab Center for the Development of the Rule of Law and Integrity (2009), 12, http://www.arabruleoflaw.org/Files/PDF/Media/English/P2/Egypt_MediaReportP2_En.pdf.

⁶⁷ Amira Abdel Fattah Hussein, "Press and Publishing Legislation in Egypt: Restricting Freedoms through Legislation" (Chapter 2 of "Press Freedom in Egypt," MA thesis, The American University in Cairo [2008]), made available by the Arabic Network for Human Rights Information (2010), <http://www.anhri.net/en/reports/pressfreedom/06.shtml>.

⁶⁸ *Id.*

⁶⁹ Amin, "Strengthening the Rule of Law and Integrity in the Arab World," 5.

⁷⁰ Rasha Allam, "Egypt Media Assessment Report," Cairo Institute for Human Rights Studies (2009).

⁷¹ James J. Napoli, "Should Egypt Have a Free Press or Not? Mubarak Government Can't Seem to Make up Its Mind," *Washington Report on Middle East Affairs* (May-June 1998), 58, 95, available at <http://www.washington-report.org/backissues/0598/9805058.html>.

Despite the publication of over 550 newspapers, magazines, journals and other periodicals in Egypt, the government played and continues to play a significant role as a “media owner and sponsor.”⁷² The Egyptian government owns 99 percent of newspaper outlets, and individuals cannot own more than a 10 percent share in any newspaper.⁷³ Furthermore, the government grants advertising subsidies causing independent media to face significant financial difficulties.⁷⁴ The Egyptian government controls all forms of media that enter the country. The censorship office is established to review these types of media, including books, journals, magazines, videos, CDs, and DVDs.⁷⁵ Additionally, a division of the censorship office is dedicated to reviewing scripts and video materials that air on state-run Egyptian television.

The three main national papers in Egypt are *Al-Ahram*, *Al-Akhbar*, and *Al-Gomhuria*. The Shura Council, based on a recommendation by the president, appoints the editors-in-chief for all three of these papers.⁷⁶ Since the government directly controls these papers, it largely avoids criticism. The major independent newspapers in Egypt include *Al Masry-Al Youm*, *Nahdet Misr*, and *Al Sherouq*.⁷⁷ Because the government does not control these papers, their journalists enjoy greater critical freedom and present a more objective viewpoint.

Egypt also has the largest and most reputable broadcast network in the Middle East. The Egyptian Radio and Television Union (ERTU) controls domestic radio and television stations in the country.⁷⁸ The ERTU is owned and controlled by the Egyptian government, through the Ministry of Information. In 1998, ERTU launched NileSat, the Arab world’s first broadcast satellite, which carries Egyptian television and radio abroad. The ERTU brought nine national stations, and, with the expansion to other countries, a total of over 250 stations worldwide.⁷⁹ The Egyptian government has contemplated privatizing its radio stations; however, it is unlikely that stations will be relinquished to foreign investors. This is particularly due to the fact that,

⁷² Freedom House, “Freedom of the Press 2010—Egypt,” 1 October 2010 *available at* <http://www.freedomhouse.org/report/freedom-press/2010/egypt#.U4I3fJSSybQ>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See Shawky Salam, “Freedom of Expression and Freedom to Access to Information in Egypt” (2007), 37–38, *available at* http://eprints.rclis.org/bitstream/10760/10439/1/PJLIS_0708_Salem.pdf.

⁷⁶ Freedom House, “Freedom of the Press 2010—Egypt”; see also Allam, “Egypt Media Assessment Report,” 3.

⁷⁷ There are also a few partisan newspapers. These papers generally address government policies and other sensitive issues. The most popular are *Al-Ahrar*, *Al-Wafd*, and *Al-Ghad*. Funding for such papers generally comes from the party itself.

⁷⁸ Allam, “Egypt Media Assessment Report.”

⁷⁹ Amin, “Strengthening the Rule of Law and Integrity in the Arab World,” 8.

because of widespread illiteracy, the Egyptian government frequently uses broadcast media to influence public opinion.,⁸⁰

Non-satellite television stations remain government mouthpieces. Coverage is focused on “protocol” news, reporting on the president’s activities in a favorable light.⁸¹ Satellite television remains the only outlet for news not controlled by the Egyptian government, and channels such as MBC, Al Jazeera, Nile News, and Al Arabiya have contributed to the general populace’s political awakening. Nonetheless, Mubarak exerted control over private satellite television by reserving licenses for businessmen with ties to his regime.⁸² Also, the Interior Ministry reportedly routinely monitored content on private channels.⁸³ The issue with the government control of media licensing cannot be overstated. Licensing restrictions have led to a culture of self-censorship by licensed outlets, and hindered independent outlets from obtaining these licenses.

Aside from traditional print and broadcast journalism, the Internet is a significant tool utilized by Egypt’s general population. In 1993, the Internet was first introduced to Egyptian universities and in 1995, it was opened to the general public. The Internet was slow to gain users until 2002, when the government introduced the “Free Internet Initiative,” which equalized the cost for internet access with that of a local telephone call.⁸⁴ To date, there are no laws regulating Internet usage, although the government has used the Emergency Law, discussed below, to repress Internet activism.⁸⁵

Unfortunately, the current political climate in Egypt holds little promise for social media freedom. As reported by Amnesty International, a leaked document by the Ministry of Interior in June 2014 suggests plans to introduce indiscriminate mass surveillance of social media in Egypt.⁸⁶ An incomplete list of topics searched for by the monitoring system would include defamation of religion, calling for illegal demonstrations, strikes and sit-ins. Such an indiscriminate mass surveillance would violate both the constitutional rights of the citizens and those guaranteed by international law.

⁸⁰ *Id.*

⁸¹ *Id.* at 9.

⁸² Sharif Abdel Kouddous, “After Mubarak, Fighting for Press Freedom in Egypt,” *The Nation*, 20 June 2011, <http://www.thenation.com/article/161555/after-mubarak-fighting-press-freedom-egypt>.

⁸³ *Id.*

⁸⁴ Freedom House, “Freedom of the Net 2011,” 18 April 2011, *available at* <http://freedomhouse.org/sites/default/files/FOTN2011.pdf>.

⁸⁵ *Id.*

⁸⁶ Amnesty International. “Egypt’s Plan for Mass Surveillance of Social Media an Attack on Internet Privacy and Freedom of Expression.” Amnesty International, 4 June 2014. Web. 12 June 2014. <<http://www.amnesty.org/en/news/egypt-s-attack-internet-privacy-tightens-noose-freedom-expression-2014-06-04#.U5HQ2xFR8MU.facebook>>.

V. The Egyptian Revolution of 2011

As the January 2011 revolution in Egypt began, the battle between government control over media and freedom of the press came to head. In January 2011, the Egyptian authorities suspended Internet and mobile phone services in an effort to prevent protestors from communicating with one another, and also to prevent emerging news reports. The non-existent connection made it extremely difficult for journalists to report from Egypt as events unfolded. The Mubarak regime blocked satellite television stations, detained foreign journalists, and sent orders to state television channels on what to report with regard to the events surrounding the revolution. It quickly became clear that the Egyptian government feared the spread of information to the masses, which directly threatened their reign on power.

On January 30, NileSat, the satellite transmission company owned by ERTU, ceased transmission of the Al Jazeera signal. There were reports that then–Information Minister, Anas Al-Fiqi, ordered all offices of the Al Jazeera bureau in Egypt to shut down, and revoked the accreditation of all of their network journalists.⁸⁷ Reports indicated that he ordered “the relevant government agencies to take the immediate legal measures necessary to revoke the licenses for live satellite transmission equipment (S.N.G.) and fiber optic cables or any other means of communication provided to Al Jazeera.”⁸⁸ There were also reports that Egyptians couldn’t access Al Jazeera on nonstate satellites, causing many to believe that the Egyptian government had jammed the broadcast transmissions. Meanwhile, state-run television continued to downplay the protests, airing footage of quiet streets in Cairo as protests raged on in Tahrir Square.

Nevertheless, these attempts to prevent the spread of information backfired on the Egyptian government; according to some reports, the Egyptian people were insulted by the government’s measures and they became more resilient and determined, which led to a surge of activism on the streets.⁸⁹

The juxtaposition of the satellite coverage versus the national, state-controlled media highlighted the credibility issues and lack of free press standards in Egypt. Several stations, including Al Jazeera, ran split screens, show-

⁸⁷ Committee to Protect Journalists, “Egypt Blocks Al Jazeera Transmissions, Orders Bureaus Shut,” 30 January 2011, <http://www.cpj.org/2011/01/egypt-blocks-al-jazeera-transmissions-orders-burea.php>.

⁸⁸ *Id.*

⁸⁹ Sahar Khamis, “The transformative Egyptian media landscape: Changes, challenges and comparative perspectives” *International Journal of Communication* 5 (2011), 1159–1177.

ing both the feed from Tahrir Square, and “the feed being shown on national television. These differences, as well as live citizen journalism on Twitter and Facebook, ultimately led the public to distrust the propagandistic state-controlled messages provided by the Egyptian government. In a bold move, Shahira Amin resigned from her post as a senior news anchor for the government-owned Nile TV, stating that she no longer wanted to propagate lies.⁹⁰

As the protests continued in streets across Egypt, violence against journalists and reporters was on the rise. There was growing speculation that such violence was encouraged, if not outright sponsored, by Mubarak in an effort to stop the protests. The Committee to Protect Journalists (CPJ) reported that the Egyptian government had “unleashed an unprecedented and systematic attack on international media” and that government security forces were detaining journalists that were covering the protests.⁹¹ In one 24-hour period, CPJ received reports of 30 detentions, 26 assaults, and 8 instances of seizure of journalist’s equipment.⁹²

Despite the government’s efforts to control and limit the flow of information, the revolution continued for 18 days until Mubarak resigned as President of Egypt. On 2 June 2012, Mubarak was sentenced to life in prison for “complicity in the murder and attempted murder of hundreds of peaceful demonstrators” in Egypt during the revolution of January 2011.⁹³ Although the conviction will likely be appealed, Mubarak is the first Arab ruler to be brought to court for sentencing by his own people.

VI. Necessary Legal Reforms

Since the uprising in January 2011, much of the Egyptian media and penal code laws remain in status quo. There is a strong need for the new government to reverse decades of suppressed media freedoms. The crisis with the Egyptian media is the need for a substantial legal reform of the laws that impede the Egyptian constitutional guarantees for freedom of speech and the press. New laws must be passed and old laws must be amended or abolished.

⁹⁰ Flintoff, Corey. “Egypt’s State TV Has New Masters, But Old Habits.” *NPR*. NPR, Web. 01 June 2014. <<http://www.npr.org/2011/06/27/137347327/egypts-state-tv-has-new-masters-but-old-habits>>.

⁹¹ Committee to Protect Journalists, “Journalists under Physical Assault in Egypt,” 2 February 2011, <http://cpj.org/2011/02/journalists-under-physical-assault-in-egypt.php>.

⁹² Committee to Protect Journalists, “Mubarak Intensifies Press Attacks with Assaults,” 3 February 2011, <http://cpj.org/2011/02/mubarak-intensifies-press-attacks-with-assaults-de.php>.

⁹³ Human Rights Watch, “Egypt: Q&A on the Trial of Hosni Mubarak,” 28 May 2012, <http://www.hrw.org/news/2012/05/28/egypt-qa-trial-hosni-mubarak>.

The laws and policies currently governing the political and civil freedoms of Egyptians are in need of reform. To begin, many of the arcane provisions of the Penal Code must be abolished, as they prevent true freedom of expression. In particular, the provisions restricting journalists from criticizing the government or any elected official must be repealed. This must be a key focus of the next parliament, as such provisions impede progress and inhibit fair and honest reporting in Egypt. If impartial information is disseminated to the Egyptian public, it may further stimulate the current sense of disenfranchisement and discord that continues to mount between citizens and their government. The Penal Code should expressly indicate that journalists will not and cannot be imprisoned, detained, or otherwise penalized for exercising their constitutional and internationally recognized right to freedom of speech. In order to comply with Article 25 of the ICCPR, Egypt must have free press and media, and journalists and citizens alike must be allowed to comment on public issues without the veiled threat of censorship.

Furthermore, defamation should be treated as a civil rather than criminal offense. In 2002, a UN special mandate indicated that "Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws" (adopted December 2002). According to Human Rights Watch, defamation laws should protect the right of expression.⁹⁴

Importantly, there is no freedom of information law guaranteeing citizens, the media, and the human rights community the right to access information about government affairs. This significantly hampers the ability of journalists to provide reliable and accurate information to the public. Robust freedom of information laws would allow for the public to determine how the government issues licenses (if so remains the case), the relationship between government officials and the media, as well as any other information of interest to the public concerning decisions made by the government.

In order for journalists to maintain their important role in Egyptian society, there must also be a public information and disclosure law. Such disclosure laws not only enable journalists to accurately report, but also ensure government accountability.

Additionally, laws restricting media ownership and licensing need to be revised. So long as the government is responsible for issuing licenses to private satellite channels, newspapers, and radio programs, the media will continue to self-censor in order to maintain their license. An independent agency should be responsible for the regulation and issuance of new licenses for radio and television broadcasting, as well as for print journalism. To ensure impartial reporting, Egyptians should consider legislation encouraging the separa-

⁹⁴ Human Rights Watch, "The Road Ahead: A Human Rights Agenda for Egypt's New Parliament" (January 2012).

tion of management and ownership of media outlets.⁹⁵ Under the current system, owners of various media outlets greatly influence the variety of information disseminated via print and broadcast media.

A truly free press will not be born overnight. As we have seen, journalists in Egypt have been operating in an environment where self-censorship is the *modus operandi*. Additionally, as Egypt undergoes a transition of power, and as future leaders are democratically elected, journalists will have to continue to push the boundaries of reporting, as they break the shackles of self-censorship. Finally, once appropriate protections are in place, journalists, at state-owned outlets, will have to grapple with disentangling themselves from government directives and learn how to report freely and accurately.

As Egypt continues to build its democracy, freedom of the press will remain vital not only to journalists, but to the future psyche of Arabs in the region. Egyptians currently hold the key to passing legal reforms and allowing for freedom of the press to flourish. As seen in Egypt, not only is toppling an authoritarian regime imperative, but so are revisions to the draconian laws utilized by the regime. In order for democracy to thrive in Egypt, essential international rights, including freedom of the press, must be put in place. Furthermore, such rights must not only be included in the Constitution, but also must be enforced and bolstered by a supporting legal framework.

⁹⁵ Mohamed Nasser, "Private Satellite Channels in Egypt: The Relationship Between Ownership and Editorial Policy" (2012).

Media, Freedom of Expression and Democratization in Morocco

ABDERRAHIM CHALFAOUAT

I. Introduction

In Morocco, incessant mass communication attempts at shaping political views and shuffling audience priorities explain the parallel histories of the media, freedom of expression and democratization. Though different constitutions, books of specifications and signing international laws guarantee freedom of expression, the approach Moroccan media adhere to has sparked and influenced discussions in the public sphere, with relation to the media, political and cultural changes, governance and power-sharing mechanisms along the democratization process. Moreover, the fluctuating move of democratization in Morocco indicates that its cadence is unsteady, that the transitory period is never-ending and that social change continually swerves to perpetuate the status quo.¹ Such practice blurs the legitimacy of democratization steps and blemishes the institutions responsible for its realization, including the Makhzen.²

In this atmosphere, journalists often receive harassment that bars their freedom of expression, which leads—sometimes—to imprisonment, specifically when taboos and tacit red lines are transgressed. The three controversial taboos in the Moroccan political landscape are: (a) criticisms of the monarchy, especially on human rights abuses; (b) territorial integrity—espe-

¹ *Media et Société au Maroc: Diagnostic et Feuille de Route* (Casablanca: Editions maghrébines, 2011); The White Book, 34. The White Book is a publication that includes the different reports, studies, discussions and recommendations of the national dialogue on media and society that took place in 2010 and 2011.

² The Moroccan ruling elite, broadly composed of the palace, the inner circle and the wide patronage network. It's also referred to in the literature as the "deep state."

cially Moroccan Sahara policy issues; (c) religion³; and –other researchers and commentators add- (d) corruption in the military.⁴ Consequently, freedom of expression is hampered when its practice challenges the status quo, but the extent of the state's crackdown on critics depends heavily on the political atmosphere.

In Morocco's modern history, conflicts over the margin of freedom of expression date back to the colonial period. Between 1912 and 1956, Morocco underwent the ordeal of French colonization wherein the National Movement (NM) tried hard to maintain freedom of expression to decry colonial atrocities. On the other hand, French officials smothered the NM newspapers, encouraged traitor media and passed on media and freedom of speech laws whose curbing effect lasted for decades.

Across postcoloniality, alterations in media loyalty have accompanied power shifts; the state and opposition parties or groups have varied in media ownership, with diverse effects on society. The outcome has been broadly twofold. Official media have sought to guarantee "silent majority" consent via: (a) denigrating participation in common issues; (b) promoting sensuality and excessive infotainment consumption; (c) encouraging monolithic readings of socio-political reality by restricting opposition representation; and (d) limiting the number of news programs and focusing on royal activities. Contrariwise, the oppositions have attempted to mobilize populations to seek more freedom and democracy, sometimes by boycotting political participation. Despite their stiff opposition to King Hassan II, when leftist and progressive parties rose to power they too smothered freedom of speech and fostered unequal media access during the reign of the current monarch, Mohammed

³ Religion per se is rarely criticized in Morocco, but religion in politics persists as a contested terrain. The monarch is also "Amir Almomineen" (Commander of the Faithful). This means that he is the highest religious authority in the country and is the holder of the last word when religious issues and interpretation are at stake. This authority held central stage in leftist activism in the 1970s, given their secular aspirations. The leftist opposition considered basing legitimacy on religion sort of theocracy. In addition, different Islamists (Aladl Walihsan, Attawhid Walislah, Salafists and the PJD) present varying challenges to the religious authority and representativeness of the king. Some believe religion should form a genuine framework for royal policies. Some accuse the king of exploiting religion to claim legitimacy that justifies dictatorship; others accuse him of lacking the specialized learning and training necessary to hold such a privileged position; and some hardline Salafists, especially before 2011, described him as nonbeliever, basing their accusation on the acts of the deep state, especially its influence on social institutions and the judiciary. But none can deny that the religious authority of the monarch calms the nerves of the public in tense times, such as the case of the Mudawana (Family Code) in 2002.

⁴ Du Plessis, Eric, "Morocco Press, Media, TV, Radio, Newspapers", pressreference website, n.d., <http://www.pressreference.com/Ma-No/Morocco.html>. (Last visited on March 10, 2014).

IV, this time against Islamist opponents. Today the grip on the media—or democracy at large—is not dictatorial enough to push Moroccans to call for regime ouster when regional uprisings occurred, because despotism is often punctuated by openness intervals, to the detriment of a genuine democracy.

The Moroccan deep state has a tradition of monopolizing the media system in the country, most of it inherited from France.⁵ From the onset, a media atmosphere was manipulated to establish a balance that consists of controlling contested political ideas and imposing respect of the state's key components. The practice of democracy usually vacillates between repression and liberalization,⁶ with self-censorship highly encouraged. An utterly free mediascape would jeopardize the security, stability and unity of the Moroccan nation, the regime believes. Yet, the margin of freedom of speech wavers due to tensions between hegemony and counterhegemony, leading to repercussions on democracy.

The intersections between the media, democratization and social change highlight the course of freedom of expression in the development of Moroccan politics. This chapter demarcates these intersections in postcolonial Morocco in relation to freedom of speech, public discourse and censorship.

II. Historical Developments of the Media and Freedom of Expression

A. Morocco under the Protectorate

During the protectorate, Spain governed the north and south of the country, while France governed the middle. The city of Tangier was an international zone. At a certain period, Morocco had three official gazettes pursuant to this division.

The earliest media regulations in Morocco stemmed from the French Law of 1881, with added restrictions on newspapers owned by NM activists and independence seekers. Newspapers held key roles, because they were the only mass communication available in the absence of audiovisual channels.⁷ With every new medium used, oppression would take on new tactics to reposition the mediascape and allow varying degrees of freedom, especially when internal and external pressures coalesced.

⁵ A. Sami and J. Duvignaud, *Presse, Etat et Société au Maroc* (Paris: s.n., 1991).

⁶ As Reporters without Borders observed in 2008. The Press Freedom Index for 2008 can be viewed at http://en.rsf.org/spip.php?page=classement&id_rubrique=33. (Last visited on March 6, 2014).

⁷ Ali Karimi, "Progress of Media Jurisdiction in Maghreb Countries" (2005). The document can be read in Arabic at <http://www.maroc.reunis.fr/cmerd/karimi/3.doc>. (last visited on April 20, 2013).

The press contributed to the struggle of wills and freedom was not highly enjoyed. French and Spanish colonizers initiated the printed press, especially in Tetouan and Tangier, even though *Maghreb Al Aksa*, a weekly English-language newspaper was the first to appear in Morocco in 1877. Mohammed el-Qorri, a member of the NM, killed in the Goulmima detention camp, is reportedly the first martyr for freedom of the press under the colonial rule. NM newspapers included *L'action du Peuple*, a weekly that Mohamed Al Ouazzani founded in 1933. Also, Abdekhalek Torres and Mohamed Bennouna started two Arabic publications in Tetouan, *Al Salam* (Peace) and *Al Hayat* (Life). On the contrary, the newspaper *El Horria* (Liberty) was procolonial.

With the onset of colonization, the Official Gazette saw light in French on 1 November 1912. Hubert Lyautey, the General Resident in Morocco,⁸ aimed to publicize the Moroccan and the French governments' decrees and resolutions. It shared information and propagated colonial discourse, implicitly linking knowledge dissemination to the colonial power. The Arabic version started on 1 February 1913. The government publicized resolutions under colonial guidance and supervision, which would link its image to the atrocities of the colonizer and destroy relations with the NM, while the colonial power would be viewed more as a guarantor for access to serious information.

On 25 November 1922, a royal decree allocated exclusive power to the regime to assign radio frequencies and monopolize telegraphy. Thus, political and social communication was gripped, without total suffocation.⁹ Limits were set up by the colonizer and the local government, though they had diverting aims and approaches. The NM utilized the media, especially newspapers inside and radio stations outside of Morocco to demonize colonization and garner sympathy for their right cause.

B. 1958–1973: Early Postcolonial Morocco

Press laws and regulations were generally inherited from the colonial period, literally or in spirit. After independence, promises to guarantee freedom of the press manifested in a 1958 basic text on civil liberties. Shortly, attempts

⁸ Under the rule of the colonial power, the General Resident was the highest representative of the government in Paris.

⁹ Mohammed Ibahrine, "The Internet and Politics in Morocco: The Political Use of the Internet by Islam-Oriented Political Movements," PhD diss., University of Hamburg, 2006. An online version of the dissertation is available at http://ediss.sub.uni-hamburg.de/volltexte/2006/2996/pdf/Ibahrine_Dissertation_University_of_Hamburg_2006.pdf.

to grip the national information system popped up in the Press Code of 15 November 1958. It demonstrated the interreliability of media and politics and how the monarchy set the framework for freedom of expression. Later, the Dahir (Decree) of 1 June 1959 introduced new regulations to intervene when newspaper editorials caused controversy, followed by another On 22 October that further stifled radio transmission activities and foreign radio stations in Morocco.¹⁰ As a result, private radio stations disappeared.

Tension sparked soon, especially because the crowning of Hassan II coincided with the rise of leftist opposition. In December 1959, the leftist newspaper *Al-Tahrir* seriously criticized administrative corruption and required governmental accountability to the electorate. Mohammed Basri, managing director and a key socialist figure, was arrested until 28 May 1960, when the Press Code was modified.¹¹

In 1962, Morocco started TV broadcasting to encourage voting for the first constitution and the first parliamentary elections. Ever since, TV has been a barometer of democracy and media freedom, and the deep state has “conceived the national information system as power resources” to unite the Moroccan nation.¹² Party press was bilingual then. For instance, the Istiqlal (Independence) Party launched *La Nation Africaine*, in 1962, to become *L'Opinion* in 1965. Publishing in French served “to reach French settlers living in Morocco and to make the French public aware of the plight of the Moroccan populace.”¹³

Sequel to socio-political upheavals, the 1960s was a period of emergency and turmoil. Amendments to the Press Code, especially Article 77, consolidated the authority of the Minister of the Interior to prohibit the distribution of publications that would destabilize public order. They legalized the ability to “censor and confiscate” any publication threatening “the institutional, political or religious basis of the kingdom.” Moreover, the prime minister could “forbid any circulation of foreign periodicals” when their publication offended Moroccan officials or jeopardized public life, without precisely defining what “a threat to public life” was. The strict measures triggered protests and a press strike. So the controversial Press Code was concealed.¹⁴

¹⁰ Mohieddine Amzazi, Muḥammad Idrīs ‘Alamī, and Université Mohammed V (Rabat), *Le parlement et la pratique législative au Maroc: Al-barlamān wal mu-mārasah at-tašriyyah fī Al-Mağrib / Muḥammad Idrīsī Al-Alamī, Muḥyi-ad-Dīn Amzāzī [et al.]* (Casablanca: Ed. Toubkal, 1985).

¹¹ OMHD, *Liberté de la Presse et de L'information au Maroc: Limites et Perspectives* (Rabat, 1995).

¹² Ibahrine, “The Internet and Politics in Morocco,” 78.

¹³ Ibid., 60.

¹⁴ W. A. Rugb, *The Arab Press: News Media and Political Process in the Arab World* (Syracuse, NY: Syracuse University Press, 1979).

In 1965, the parliament amended the Press Code by banning Article 77 to deprive the regime of the ability to suspend or cancel publications. As a reaction, the monarch tightened the fist over the government, suspended the rebellious parliament and declared a state of national emergency. Abdelkrim Elkhatab, president of the parliament, objected to the resolution and formed a new party that later became the current leading Party of Justice and Development (PJD). Trade unions and various opposition parties and groups were oppressed and more censorship measures were taken. After the Casablanca uprising in 1965, the monarch started a series of televised improvised talks with a threatening tone, ready to maintain stability at any cost. This is one of the reasons why Abdelilah Benkirane, the current head of the government, hinted in an interview with Al Jazeera that the reaction of the Moroccan population would have been different had the Arab Spring occurred during the reign of the late monarch. The print press was generally tolerated even when newspapers transgressed red lines because of the high rates of illiteracy and the ability of broadcast media to downplay the opposition, underestimate political participation and iconize the monarch as the only serious political actor without whom political stagnation would overwhelm.

The years between 1962 and 1970 were a state-owned radio boom. Seven regional stations saw light.¹⁵ Their wide coverage enabled spreading propaganda and pop culture, especially as they tried to cater for the cultural differences of listeners.

With growing international attention to human rights and freedom of expression, the mid-1970s witnessed some shy attempts at organizing and regulating the media scenery. The Maghreb Arab Press (MAP) started as a private news agency in 1959. In 1971, it was nationalized to become the official news agency, or the supervised and filtered news gateway.

C. 1973–1998: Period of Globalized Human Rights

The year 1973 was a turning point in Moroccan media laws. Restrictive amendments touched the 1958 General Freedoms Law, including the Press Code—especially Section 77. Following two failed coups (in 1971 and 1972), liberalization was reduced to a minimum.¹⁶ The Press Code became similar to the Penal one. In a period known as “plumb years,” torture, arbitrary detention and forced disappearance reigned supreme against the opposition.

¹⁵ In the cities of Marrakesh, Fez, Oujda, Agadir, Dakhla and Tetuan in 1958, 1961, 1962, 1971, 1976, 1980 and 1982, respectively.

¹⁶ “13 July 1971: Death for Moroccan Rebel Leaders,” BBC website, n.d., http://news.bbc.co.uk/onthisday/hi/dates/stories/july/13/newsid_2503000/2503093.stm.

Official media were monopolized to blackout military and police interventions nationwide and confine awareness of the turmoil.

As for TV, it has always been a contested terrain, especially during election times. In the 1976 parliamentary elections the opposition was denied access to public media, but the situation changed a bit in 1982, after it agreed to the “rules of the game,” according to Ben Ashour, (1992: 90).¹⁷ Local issues rarely received adequate coverage or analysis, except royal visits to different regions of the country. Driss Elbassri held the Ministries of the Interior and Communication together from 1985 to 1995 in four successive governments. Somehow, the written press was freer, except Islamist newspapers,¹⁸ but the educational system was harshly transmogrified to relegate its enlightening role. So, reading levels remained low while the already discouraging illiteracy rates hampered sustainable readership. During times of crisis or political disorder, the media would turn a blind eye, in the absence of equally strong opposition media. Political awareness dwindled, consequently. But, with the political integration of leftist opposition a flood of publications swept the Moroccan mediascape. In 1997 alone, around 96 new publications emerged.¹⁹

Simultaneously, a number of cultural figures resisted change of loyalties. The regime had little patience to allow their voices to shake up the public sphere or increase public awareness of the human rights violations. One of them was Ahmed Snoussi, alias Bziz, a stand-up comedian. The music group Nas Elghiwane attempted to widen a shrinking margin of freedom of speech via their concerts. They aimed to mobilize people to view the political realities as they were and react accordingly, with strong implicit messages in their songs. A group member was poisoned to death. Another was Saida Fikri, a singer whose music “displays a special concern for the hardships, struggles and suffering of the ordinary people of Morocco.”²⁰ Meanwhile, intellectuals such as Taha Abderrahman or Mehdi Elmadjra never appeared on public media despite their national and international intellectual reputations because they refused to trade telling the truth for power. University student unions and civil society provided an alternative sphere for them to enjoy freedom of opinion and expression.

¹⁷ Ben Ashour, A. 1992. Mass Media in Morocco. (Unpublished Master Thesis at the Moroccan High School of Journalism, Rabat).

¹⁸ “When Ramid was a Journalist Publishing Alsabeel Newspaper and It was Banned”, Alrai website, n.d. <http://www.alrai.com/archive/article/2933.html>. (Last visited on January 10, 2014). This article lists some of the Islamist newspapers that were either banned or besieged, focusing on Alsabeel that Mustapha Ramid, the current Minister of Justice and Freedoms published.

¹⁹ Ibahrine, “The Internet and Politics in Morocco,” 62.

²⁰ “Saida Fikri”, Index of Arabic Music Website, June 19, 2009, <http://arabicmusica.blogspot.com/2009/06/saidafikri.html>. (Last visited on January 10, 2014).

Globalized human rights, especially the right to freedom of expression and the right to access public information, presented serious challenges to the interaction of media and politics in Morocco. Audiences turned to international channels seeking a larger scope of analysis, richer discussions and more pluralism, though they devoted less airtime to Moroccan affairs.

Supervised by UNESCO, the Windhoek Declaration²¹ of 1991 marked the first of a series of conferences on freedom of the press. As a result, Morocco exerted certain constitutional amendments in 1992. Besides, a national debate was launched in 1993, seeking to banish the 1936 Colonial Media Law, and rectify the limitations on the 1973 law. Actually, the 1936 law was overthrown in 1994, but other recommendations of the debate didn't see light until the end of leftist-led "compromise government" in 2002. In 1993, a Ministry of Human Rights was created, but other media restrictions were added.²² That's the balance. The other side of the balance is that the written press continued to enjoy diversity and pluralism, though newspapers often exchanged ideological or political criticism, to the abuse of freedom of expression.

In the 1996 constitutional reforms, people's right to media freedom and access to information were clearly ascertained, but simultaneously the law says that:

[terms] of ransom, imprisonment and medium banning are ordered from the Minister of the Interior or via a decree from the prime minister against anyone who transgresses the respect due to the monarch, the royal institution, the Islamic religion or territorial integrity, or publicize what may touch general morals or intentionally insult or libel individuals or groups or the like.

The fuzzy terms opened room for ambiguity and diverse interpretations. Clearly, public and private media were banned from evaluating or questioning public policies. Yet more mediascape democratization was expected with the founding in 1989 of the 2M cable television station, the first privately funded television enterprise in the Arab region. It was a milestone against the post independence Arab states' monopolistic domination of mass media, but the experiment was short-lived; the Moroccan government eventually purchased a controlling share of 2M that was beset with financial problems, which kept TV umbilically connected to regime elite and mediatized official figures.

²¹ "Declarations on Promoting Independent and Pluralistic Media", UNESCO website, May 3, 1991, http://www.unesco.org/webworld/fed/temp/communication_democracy/windhoek.htm. (Last visited on January 10, 2014).

²² Karimi, "Progress of Media Jurisdiction in Maghreb Countries," 16.

D. 1998–2012: Morocco in the New Age

The traditional leftist opposition of the Socialist Union of Popular Forces (USPF) ended in 1998 when Abdurrahman Elyoussfi led the “consent government” or “negotiated change,” one year before the demise of King Hassan II. Great expectations were put on the new government to realize the long-standing calls to democratize the media.

With the crowning of King Mohammed VI in 1999, a truth commission, “Equity and Reconciliation,” was set up to investigate previous human rights violations against the opposition. The committee confirmed nearly 10,000 cases, ranging from death in detention to forced exile. Its hearings were hosted in open squares and broadcasted on public TV, as a sign of public media change. Nevertheless, those invited—or permitted—to give live testimony were not allowed to mention the names of their persecutors.²³ As well, details were not revealed about the disappearance of Mehdi Benbarka, one of the founders of USPF.

Media laws were amended in 2002. The reform was very limited and much more influenced by temporary rather than strategic considerations. It professed to repudiate journalist imprisonment, except infringements of the right to privacy or violating religious foundations of the state. The new law was criticized for not considering the views of media professionals and activists who sought a serious transition toward freedom of expression or to shrink the press legislature’s reliance on the Penal Code. So, the government had to reconsider the law in 2006. Also, the High Authority of Audiovisual Communication (HACA)—a long-awaited beacon of freedom of expression and audiovisual media liberalization—was founded in 2002 to end the state media monopoly.

After the September 11 attacks, Morocco aligned with the “with us” group in George W. Bush’s division of the world into “with us” or “against us.” The involvement in the war on terror strengthened sequel to the 16 May 2003 explosions in Casablanca.²⁴ The news coverage blamed the PJD for the “moral responsibility” for terrorism—that is, for creating an atmosphere conducive to religious fanaticism and self-explosion—even though the PJD condemned the operation.

Six days after the attack, the parliament passed the controversial 03.03 Law, despite the earlier objections of social and human rights NGOs.²⁵

²³ Ahmed Benchemsi, “From Subtle Dictatorship to Subtle Revolution,” Oslo Freedom Forum, 2011, YouTube, <http://www.youtube.com/watch?v=y0UIagNNMhw>. In this video, Ahmed Benchemsi, an ex-editor from Morocco, explains how the Moroccan regime wavers between genuine democracy and totalitarianism.

²⁴ This is Morocco’s September 11. Five sites in Casablanca, the economic heart of the country, were bombed and 45 people died, including 12 of the perpetrators.

²⁵ The timeline of Law 03.03 related to fighting terrorism and the reasons behind its suggestion and discussion can be traced on the website of the Moroccan parliament: http://www.parlement.ma/_bilanlegislatif.php?filename=200803251124480.

Though it purported to preempt terrorist attacks, journalists felt it would curb their freedom of expression, even indirectly. For them, the law would encourage self-censorship. The law also avoids providing precise definitions of some of its key terms. For instance, “terrorist acts” are vaguely defined as those acts “related intentionally to an individual or collective act aiming to seriously harm public order by intimidation, terror or violence.”²⁶ As Amnesty International noted in 2007, “the terms ‘intimidation,’ ‘terror’ and ‘violence’ are not defined in the law, allowing the possibility of the government to put pressure on political opposition groups or human rights defenders.”²⁷ So far, around 2,300 people have been indicted with this law, most of them Salafist Islamists; 18 were sentenced to death. Yet, no indictee has ever been executed in Morocco since 1993.

This unsteady progress inaugurated a national dialogue on media democratization in 2010. Part of its conclusions is that media democratization necessitates giving constitutional powers to the press “that would allow it to rightfully claim to have a certain strong and formal authority and legitimacy” similar to the executive, legislative and judicial powers.²⁸ Put differently, the press is unable to exercise its watchdog power due to the absence of judicial or constitutional protection, which would either tame journalists or push them to seek protection elsewhere. As such, journalists take considerable risks when they venture into heated political debates or shed light on unwanted socio-economic affairs.

III. Current Public Discourse on Freedom of Expression

As an interaction with the uprisings that swept neighboring countries, Moroccan activists launched their own version of the Arab Spring on 20 February 2011. Generally, police intervention was not common, though human rights groups claim several protesters died in the demonstrations.²⁹ Despite being hailed by the US administration as “model” of the Arab Spring,

²⁶ An online version of Law 03.03 (in Arabic) can be found here <http://www.maktoob-blog.com/redirectLink.php?link=http%3A%2F%2Fi3.makcdn.com%2FuserFiles%2Fm%2Fo%2Fmosslim74%2Foffice%2Floi2003.pdf>. (Last visited on January 10, 2014).

²⁷ “Morocco Submission to the UN Universal Periodic Review”, Amnesty website, December 29, 2007, <http://www.amnesty.org/en/library/asset/MDE29/012/2007/en/67f977c8-a71b-11dc-bf49-a1e867231d5c/mde290122007en.pdf>. (Last visited on February 5, 2014).

²⁸ The White Book, 17.

²⁹ Human Rights Watch, “Country Summary: Morocco and Western Sahara,” January 2012, http://www.hrw.org/sites/default/files/related_material/morocco_2012.pdf. (Last visited on February 5, 2014).

the devil lies in the details of the Moroccan Spring, based on the current state of affairs.³⁰

Generally, observers agree that a considerable democratization interval occurred with the Arab Spring. Alterations touched upon laws, political players, and distribution of powers. Some Salafist leaders—particularly Mohamed Elfizazi, Abdelwahab Rafiqi and Hassan Elkettani, among others—were released after being imprisoned in the aftermath of the Casablanca terrorist attacks. As well, PJD moderate Islamists lead the current government sequel to a landslide victory in the 25 November 2011 parliamentary elections. But the struggle over media control, loyalty and democratization still persists, exemplified by the discussions over the new books of specifications.

The atmosphere of democratization in the Middle East and North Africa (MENA) region has pushed the Moroccan media to democratize, especially since the media lay at the heart of the uprising. Not surprisingly, a number of media officials were mentioned by name and were accused of backing autocracy. Temporal changes occurred on the mainstream media, especially TV, wherein more freedom of expression was allowed. More importantly, some journalists such as Hourya Boutayeb, a TV news presenter, protested the sordid working condition and voiced yearning for more freedom of expression.

The 2011 constitution—adopted by a referendum—honors freedom of expression and guarantees “freedom of thought, opinion, and expression in all its forms.” It also recognizes freedom of creativity and publishing in the domains of literature, art and scientific research, while it bans any violation of the privacy of personal communication unless via a judicial order in due cases. As well, it allocates to civil society important legislative tools to express opinions, evaluate public policies and suggest alterations to official resolutions. Citizens, whether individuals or NGO members, can present petitions and proposals to official authorities to concretize the ideal of participatory democracy that the Constitution promises. For its interesting democratizing potential, the royal speech that appeared in the media described it as “a constitution for human rights.” Yet, the struggle for its actualization is long-term and the burden rests with all the actors in the socio-political scenery because the deep state could freeze change and perpetuate the status quo at any time.

Freedom of the media and expression has become a benchmark for democracy. For example, youth movements have sought an end to the “entertain to govern” policy. Mawazine, an annual cultural and artistic festival in Rabat, is organized by the “mega association” Morocco of Cultures over which Mohamed Mounir Elmajidi—the royal accountant—presides. Young people

³⁰ Alec, Simanov. “United States and Moroccan Status Quo”, Atlantic Council website, July 31, 2012, http://www.acus.org/new_atlanticist/united-states-and-moroccan-status-quo. (Last visited on February 5, 2014).

denounce the discrepancy between the country's poverty and squandering huge public sums on the festival. Mawazine also haunts public airtime, unlike the activities of all other Moroccan associations. Its cultural and artistic rationale is delegitimized since it coincides with academic exams in May. Most importantly, Mawazine transcends public cultural policies.³¹ The Ministers of Culture deny responsibility for the festival. Artists who participate in the mega festival never mention the paradox of the country's impoverishment and the huge sums they receive. They simply "took their money, said nice things about Morocco—precisely the point of bringing them there—and moved on to the next gig."³² Likewise, most city councils nationwide are obliged to organize about two hundred summer festivals under the patronage of the monarch, sometimes for touristic and sometimes for no clear reasons, with secret funds. Criticizing such policy often generates trouble.³³

Today, the challenge of democratizing the media sphere rests with the Arab Spring government, but—more importantly—the role of media bodies is crucial. The media mosaic in Morocco includes some 500 publications, 17 private radio stations, 10 TV stations and 15 regional and thematic radio stations, whereby a critical mass of human resources—roughly 3,000 journalists and professional card holders—function. The struggle goes on and the degrees of freedom continue to vary. For instance, HACA reports show considerable media pluralism, but groups, communities, NGOs and parties always criticize the state of pluralism and diversity because media practitioners manage to find ways to bypass the law and restrict its ambit, following the balance model described earlier. Public discourse continues to extol freedom of expression and promises to guarantee its practice, but setbacks usually mar it, especially due to the discrepancies between the government and the deep state. Street protesters in front of the parliament have become used to police batons, but public media rarely discuss the issue. Even an MP was beaten for sympathizing with jobless diploma holders protesting for

³¹ Elhouari, Nafissa. "Mawazine Festival, Pleaaase", May 12, 2013, <http://www.youtube.com/watch?v=lajuQofXlly>. (Last visited on April 20, 2014). Possibly, this is the shrewdest and most meticulous youth podcast against the Mawazine Festival, as a result of which Nafissa was harassed by the police and was pushed to give up her Youtube program "Sour Honey".

³² Levine, Mark, "Meanwhile in Morocco ...", Aljazeera website, June 30, 2012, <http://www.aljazeera.com/indepth/opinion/2012/06/2012626133253231919.html>. (Last visited on March 14, 2013).

³³ Elmoussaoui, Mohammed, "A State of Artistic Festivals in Morocco", Lakome.com website, September 3, 2013, <http://bit.ly/17NtJjU>. (Last visited on September 24, 2013 before the website was blocked for allegations of spreading terrorist information against Morocco). This investigative article in Arabic tries to survey how music festivals partake in the soft arsenal of the deep state to distract attention from social problems. The article can be read here.

jobs. Protesters against the degrading protocols of the royal feast of loyalty were beaten. Protesters against the royal pardon to a Spanish pedophile were beaten as well, including an MP in Casablanca. Official media, especially TV, still black out these events, and programming rarely shifts away from the official formulation of reality.

On the other hand, the Internet offers an alternative public sphere for freedom of expression. Youth frequently managed to influence politics by organizing group discussions, writing humorous Facebook statuses, making funny Photoshop caricatures, writing articles for the incessantly increasing news sites or sharing videos and podcasts. With the Internet, the margin of freedom of expression is unprecedented, though in extreme cases young activists receive police harassment. In the 2011 uprisings, Moroccan youth took to the streets in different groups under the umbrella term “February 20” by starting Facebook groups (Feb 20, Baraka, Mamfakinsh, Moroccan Youth against Corruption and Despotism, etc.). They organized weekly, and sometimes biweekly, demonstrations nationwide, especially in crowded areas in Casablanca. Often, fresh footage was sent to Al Jazeera, while live coverage was provided for Moroccans inside and outside of the country via streaming sites. The use of mockery and sarcasm to address political irregularities became common practice on the Internet, helped by the high rates of mobile penetration, inexpensive bandwidth and the multimedia applications 3G mobile services offer. As a result, Internet statistics run high for Morocco in 2011 to rank third on Facebook in the MENA region. Between February and June 2011 the total of Moroccan Facebook users “rose by over 600,000 users to a total of 3,525,460 users. In June 2011, Facebook was the most frequently searched and visited site in Morocco, ranking higher than the Google search engine.”³⁴ News sites have also proliferated, to make of the Internet a serious watchdog for human rights abuses, shaky public policies or traditional media blackouts.

IV. Attempts to Thwart Freedom of Expression

Within the balance model, the Moroccan regime often resorts to censorship. For instance, in 2010, the Rabat bureau of Al Jazeera was closed upon allegations of biased coverage of Moroccan issues, especially the Sahara Affair. Also, Rachid Nini, a popular columnist and former editor of *Al-Massae*, was imprisoned for a year. His renowned column “Shouf Tshouf” often criticized

³⁴ Zahir Rahman, “Online Political Activism in Morocco: Facebook and the Birth of the February 20th Movement,” *Journal of New Media Studies* 1 (2012), http://www.academia.edu/1417051/Online_political_activism_in_Morocco_Facebook_and_the_birth_of_the_February_20th_movement.

intelligence agencies, government and regime corruption and counterterrorism policies. He was convicted “of attempting to influence judicial decisions, showing contempt for judicial decisions, and falsely accusing public officials of crimes.”³⁵ But these incidents were not unprecedented. As editor of the Arabic weekly magazine *Nichane*, Ahmed Benshemsî tried to push the limits of freedom of expression. In 2006, the magazine and its website were banned after publicizing “provocative jokes” related to religion. In addition, Driss Chahtan, editor of *Al-Michaal* weekly, was imprisoned for one year in 2009 over questioning the health condition of the monarch.

Morocco has been a leading country in Africa and the Arab World in providing Internet access and in the number of new media accounts. That’s why a new law was passed in 2009 to meet the novel challenges, though censorship is much less explicit. YouTube has enabled users to publicize incidents of police violence, promote causes or organize protests. Indications of Internet surveillance creep up every now and then, though. Activists, journalists, bloggers and netizens rarely question the technologies specialized police departments use to catch them criticizing the regime red-handed. Few violations have been recorded, such as shutting down YouTube for a few days in May 2007. In 2008, Fouad Mortada, a young IT engineer, was sentenced to three years and a \$1,350 fine for creating a fake Facebook account with the name of Prince Moulay Rashid, the monarch’s brother. He later received a royal amnesty,³⁶ unlike Abdessamad Haydour, a student who was sentenced to three years for denouncing the monarch in a video posted on YouTube.³⁷ E-journalists such as Mohammed Erraji, young podcasters such as Nafisa Elhouari or Tarjist sniper Mounir Agueznay were pushed into self-censorship after imprisonment or police harassment. In 2013, Mustafa El-Hesnawi,³⁸ a blogger and activist known for defending Islamist detainees, was arrested without cause. Such cases tarnish the public discourse on freedom of the press and opinion, which, consequently, downplays the attempts to democratize the Moroccan public sphere.

³⁵ “Morocco and Western Sahara”, Human Rights Watch website, January 2012, http://www.hrw.org/sites/default/files/related_material/morocco_2012.pdf. (Last visited on March 5, 2014).

³⁶ Ben Gharbia, Sami, “Morocco: Fouad Mourtada free”, globalvoicesonline website, March 18, 2008, <http://advocacy.globalvoicesonline.org/2008/03/19/morocco-fouad-mourtada-free/>. (Last visited on March 5, 2014).

³⁷ Schuts, John, “Despite reforms, Moroccan student still in jail for “insulting the king””, ifex website, July 16, 2013, http://www.ifex.org/morocco/2013/07/16/student_imprisoned/. (Last visited on March 5, 2014).

³⁸ “Moroccan blogger detained, charges against him undeclared”, ifex website, May 27, 2013, http://www.ifex.org/morocco/2013/05/27/blogger_detained/?utm_source. (Last visited on March 5, 2014).

These cases cannot eclipse the freedom of expression e-news websites enjoy and the updating ability and wide coverage they offer while combining live videos, instant messages, probing interviews and reader comments. In the Arab Spring context, censorship seems more difficult and novel methods to bypass censorship will continue to be invented.

New media, such as Facebook, blogs, e-news websites and YouTube, are utilized to push the limits of democracy and freedom. Yet, resort to traditional media remains inescapable in a country whose illiteracy rates are above 50 percent. Street protesters, for example, presented interviews, shared videos or photos and sent footage to Al Jazeera.

V. Conclusion

It is hoped that the post-2011 government will call a halt to the violations of freedom of expression carried out by previous governments, and also that it will pave the way for a systematic freedom-friendly public sphere. The first step was concretized in books of specifications that promise to block media corruption, extend the margin of equality of opportunity in media access and even out socio-political representativeness. The books also designate quality and ethics control to specific committees. Another gleam of light was seen when the current Minister of Justice and Public Freedoms, speaking at a press conference, denied the presence of any journalist in Moroccan prisons. Also, different media continue to critique public policies and government officials, though sometimes exaggeratedly. The government rarely depends on the Penal Code when it makes its response. Two exceptions happened when two ministers sued two journalists for defamation, but one of the ministers decided to receive one symbolic dirham as a compromise, compared to the body-breaking fines newspapers used to receive. Also, none of the two journalists went to prison.

Yet, other legal alterations need to see light for more effective media change to be realized. A first prerequisite is to break the relationship between the Penal and Press Codes. A second is to pass a law for access to information long-awaited by media professionals. Also, more democracy should occur in selecting HACA members. The main characteristic behind selection should be professionalism rather than loyalty to the deep state or political affiliation. The powerless state of the HACA equally deserves rectification to enable it to intervene when books of specifications are transgressed and freedom of expression violated. Moreover, civil society, to which the 2011 Constitution allocates influential powers, can partake in the struggle for more overtures at this opportune moment.

Otherwise, it would tarnish the image of Morocco that political stakeholders today, both government and monarchy, while more liberal than in

previous experiences, give “contradictory signals as to whether [they] really want to democratize the regime and the country.”³⁹ In the absence of genuine change, nobody can predict how the political situation may develop, especially since orchestrating cyberactivism with offline democracy-seeking activism has given proof for combating despotism in the region. Communicating a single-faceted story of political reality is no longer possible, while the “entertain to govern” policy may not succeed forever, since the same youth that used to share trivia videos, photos and games on social media now use Facebook groups to organize street gatherings to achieve socio-political reform.

³⁹ “Press Freedom suffers new threats”, ifex website, July 29, 2009, http://www.ifex.org/morocco/2009/07/29/new_threats/. (Last visited on March 5, 2014).

The Danish Cartoons Controversy: Hate Speech Laws and Unintended Consequences¹

RICHARD N. WINFIELD and JANINE TIEN

I. Introduction

The Danish cartoons controversy is now almost a decade old and yet its violent legacy continues to influence international affairs. For example, a French magazine's publication of naked Mohammad cartoons on 19 September 2012 spurred the French government to preemptively close French embassies and schools in 20 countries out of fear of a repeat of the violent protests that occurred after the publication of the Danish cartoons in 2005.² The vicious resilience of the Danish cartoons controversy also manifested itself in June 2012, when four men were sentenced to 12 years in prison for their plan to destroy the newspaper office which published the cartoons and in May 2012, when two other men were arrested in Denmark for plotting new terrorist acts motivated by the 2005 Muhammad cartoons.³ The controversy remains an instructive one for at least two reasons. First, it represents the paradigm of

¹ A version of this article was presented at the colloquium "The Content and Context of 'Hate Speech': Rethinking Regulation and Remedies," sponsored by the Benjamin N. Cardozo School of Law/Yeshiva University and the Center for Media and Communication Studies (CMCS) of the Central European University in March 2010.

² See, e.g., Kim Willshur, "Paris Magazine's Muhammad Cartoons Prompt Fears for French Embassies," *The Guardian*, 19 September 2012, <http://www.theguardian.com/world/2012/sep/19/paris-magazine-muhammad-cartoons-french>.

³ See, e.g., Mette Fraende, "Denmark Jails Prophet Cartoon Plot Gang for 12 Years," *Reuters.com*, 4 June 2012, <http://www.reuters.com/article/2012/06/04/us-denmark-trial-idUSBRE8530MH20120604>; see also John Acher, "Prophet Cartoons Haunt Denmark as Verdict Nears," *Reuters.com*, 1 June 2012, <http://www.reuters.com/article/2012/06/01/denmark-trial-idUSL5E8H1JNC20120601>.

a volatile convergence of three elements: cultural tensions, political manipulation both in the West and in the Islamic world, and hate speech and blasphemy laws. Second, the controversy illustrates the critical role that hate speech and blasphemy laws played in the outcome, and the distinctly unintended consequences that those laws produced.

II. The Danish Cartoons Controversy and the Impact of Hate Speech/Blasphemy Laws

The sequence of events in the Danish cartoon controversy is itself instructive. One week after the newspaper *Jyllands-Posten* published the cartoons in late September 2005, a group of Danish Muslim clerics protested and called upon the newspaper to retract and apologize.⁴ Initially, it was simply an angry editorial controversy between the editors and the clerics.

Two weeks after the publication, ambassadors to Denmark from ten Muslim countries and the Palestinian representative in Denmark wrote to the Danish prime minister objecting to the cartoons and requesting a meeting.⁵ In response, the prime minister publicly refused to meet with the diplomats.⁶ Hitherto the government was not involved in the controversy; however, that state of affairs could not persist for long. The government could not avoid becoming entangled because Denmark has on its books a broadly worded hate speech law.⁷ Section 266(b) of the Criminal Code punishes “any person, who publicly . . . makes a statement . . . insulting or degrading a group of persons on account of their race . . . or belief.”⁸ A person convicted under the hate speech law is liable to be fined or imprisoned for up to two years. Denmark thus has an explicit authority to try and convict a news organization like *Jyllands-Posten* that publishes words or images allegedly insulting or degrading to believers in Islam.

In addition to its hate speech law, Denmark has a blasphemy law that is similarly broad in its coverage. Section 140 of the Criminal Code punishes “any person who, in public, ridicules or insults the dogmas or worship of any

⁴ Jytte Klausen, *The Cartoons That Shook the World* (New Haven, CT: Yale University Press, 2009).

⁵ *Ibid.*, 185.

⁶ *Ibid.*, 186.

⁷ The Danish Criminal Code is called *Straffeloven* (hereafter, “Strfl.”). An English translation of the Danish Criminal Code can be found in Malene Frese Jensen et al., *The Principal Danish Criminal Acts: The Danish Criminal Code, the Danish Corrections Act, the Administration of Justice Act (Excerpts)*, 3rd ed. (Copenhagen : DJØF Pub., 2006), 9–74.

⁸ Strfl. 266b(1), translated in Jensen et al., *The Principal Danish Criminal Acts*, 64.

lawfully existing religious community.”⁹ An offender can be imprisoned for up to four months. The Danish public prosecutors were specifically empowered to prosecute any news organization that published material mocking or scorning Islamic doctrines or acts of worship. Whether or not they chose to prosecute *Jyllands-Posten*, the Danish government was inextricably thrust into the vortex of the cartoon controversy.¹⁰

Thereafter, less than a month after publication, eleven Muslim groups in Denmark filed a criminal complaint against *Jyllands-Posten* under these two statutes. What had been a rancorous private exchange became transformed into a politicized governmental issue. The fact that these two statutes existed meant that the government could not avoid deciding whether to prosecute the newspaper. What confronted the public prosecutor was a politically toxic choice: either indict and favor the Muslim groups, or dismiss the complaint and favor the newspaper and the great majority of Danes.¹¹ The law permitted no other alternatives. Three months went by while the public prosecutor considered whether to prosecute. No violence had occurred at this point in time.

Finally in January 2006, the public prosecutor announced that he had rejected the criminal complaint filed by the Muslim groups and refused to indict, triggering the beginning of the Middle Eastern boycott of Danish goods.¹² Several Middle Eastern governments and numerous Muslim clerics and politicians condemned the cartoons and the Danish government. The first violence erupted in Gaza within two weeks of the Danish government’s refusal to indict, and subsequently spread throughout the Muslim world.¹³

This was a controversy that had to escalate and become politicized. The controversy inevitably embroiled the government since the government was obligated to formally respond due to the statutes in the Criminal Code which require the government to act. The wording of the two statutes was sufficiently porous and vague to give the eleven Muslim groups some optimism to expect that the government would indict *Jyllands-Posten*. The editorial controversy magnified into a politicized governmental crisis because the government could not escape becoming entangled with it.¹⁴ We know that the riots only began not when the cartoons were published but over three months later, immedi-

⁹ Strfl. 140, translated in Jensen et al., *The Principal Danish Criminal Acts*, 45.

¹⁰ Richard N. Winfield, “An Editorial Controversy Metastasizing: Denmark’s Hate Speech Laws,” *Communications Lawyer* 24.1 (2006): 35–36.

¹¹ *Ibid.*, 36.

¹² Klausen, *The Cartoons That Shook the World*, 145.

¹³ *Ibid.*, 190.

¹⁴ *Ibid.*, 47: “But they [the Danish cartoons] were foils for the deliberate manipulation of political actors—both national and transnational, state actors and nonstate actors—who were already engaged in battle.”

ately after the prosecutor announced his decision not to indict.¹⁵ The violence pivotally followed that decision, not the publication of the cartoons.¹⁶ The availability of the broadly worded laws transformed and ignited what had been a rancorous private exchange into a legal, political and governmental crisis.¹⁷

The Muslim groups viewed the decision not to prosecute, as an official, political and hostile act of the Danish government.¹⁸ Is it possible to argue that if Denmark lacked the power to prosecute, that is, if no hate speech or blasphemy laws existed, then the Danish government would not have been held responsible? Did the government become needlessly involved by possessing the explicit power to criminalize truly offensive expression? It is evident that in its efforts to maintain a legal arsenal enabling it to suppress racial and religious insults, Denmark may have paid a very steep price. We can reasonably speculate that without the laws the controversy would likely have remained local, nongovernmental and containable. The very existence of the laws helped cause a local issue to escalate into a global, religious, governmental controversy.

It goes without saying that some categories of hate speech are beyond the pale: fighting words, true threats, and advocacy that is directed to inciting or producing imminent lawless action and is likely to produce such action. Neither the Danish cartoons nor the other sociopathic examples considered below, however, fall into any of those categories.

III. National Comparative Examples

Denmark's unfortunate experience with its hate speech laws is by no means unique. Canada, for instance, offers three examples of the unintended consequences of its hate speech laws.¹⁹ In 2006, a right-wing journalist in Alberta chose to republish the Danish cartoons. A local Islamic cleric filed a complaint against the journalist with the Alberta Human Rights and Citizenship Commission, charging the journalist with "advocating hatemongering cartoons" in the media and "defaming me and my family because we follow and

¹⁵ Ibid.

¹⁶ Ibid., 44: "For the first six months of the cycle the actors were primarily diplomats and government officials. Popular mobilization followed rather than preceded the involvement of governments and diplomats."

¹⁷ Winfield, "An Editorial Controversy Metastasizing: Denmark's Hate Speech Laws," 36. Ekmeleddin İhsanoğlu, secretary-general of the Organisation of Islamic Cooperation, stated that the Danish prosecutor's decision not to prosecute was part of "a campaign against us [Muslims]."

¹⁸ Ibid.

¹⁹ See, e.g., Canada Criminal Code, R.S.C. 1985, ch. C-46, § 318–19 (1985); Canadian Human Rights Act R.S.C. §13 (1977).

are related to Prophet Muhammad.”²⁰ The journalist was required to appear before and be investigated by an official of the Commission. The journalist was interrogated about the cartoons, his thoughts and his motives and the other circumstances surrounding his behavior. The hearings were closed to the public.

The journalist was thus not only facing punishment for reprinting the cartoons but was also facing punishment if he did not adequately explain and defend his personal intentions and state of mind for his publication. The tribunal was not so much concerned with the actual act or injury of reprinting the cartoons but in forcing the journalist to privately explain the legitimacy of his personal expression to the government. The hate speech law had transformed the government into the ultimate arbiter to decide the validity of a citizen's intentions for their expression.

In the second example, an academic in British Columbia launched into a public diatribe against American foreign policy in 2001.²¹ She claimed that Americans are “bloodthirsty, vengeful and calling for blood,” and consequently faced a government hate crimes investigation for her statements.²² Although the Canadian hate crimes law was created to protect minority groups from hate speech, in this case the government's investigation into the academic was invoked to censor and condemn minority political views.

The third example, involving an overly broad discrimination law that unintentionally resulted in the government's overreaching of its authority over its citizens, occurred in Toronto when a print shop owner was asked to print a letterhead for a gay rights activist group.²³ The printer declined to provide his services on the grounds that the cause of homosexuality offended his religious beliefs. He was subsequently investigated for violating Ontario's Human Rights Code by discriminating against an individual on the basis of his sexual orientation.²⁴ In other words, his refusal to provide services and explanation for his refusal was interpreted to be an act of hate speech and discrimination. It is to be noted that the printer had always accepted print jobs from individual gay customers and performed pro bono work for a local AIDS group, which supported gay patients.²⁵ The printer attempted to distinguish his refusal to support a particular group's cause by printing its beliefs, from a discriminatory refusal to provide services to an individual based upon their sexual orientation. He argued that to legally force him to print promotional homosexual mate-

²⁰ Glen Greenwald, “The Noxious Fruits of Hate Speech Laws,” *Salon.com*, 13 January 2008.

²¹ David E. Bernstein, “‘You Can’t Say That’: Canadian Thought Police on March,” *National Review Online*, 2 December 2003.

²² *Ibid.*

²³ See *Brillinger v. Brockie* (No. 3) (2000), 37 C.H.R.R. D/15 (Ont. Bd. Inq.).

²⁴ Human Rights Code, R.S.O. 1990, c. H.19.

²⁵ Bernstein, “‘You Can’t Say That.’”

rial was to infringe upon his rights to freedom of religion under Section 2(a) of the Canadian Charter of Rights and Freedoms.²⁶ The local Human Rights Commission, however, ultimately found the printer guilty of “discriminatory conduct” on the grounds of sexual orientation and ordered the printer to pay the group C\$5,000, print the group’s requested material and apologize to the group’s leaders.²⁷ On appeal, the Ontario Divisional Court upheld the Human Rights Commission’s decision but countered the rationale of the Human Rights Commission’s decision by stating it was overbroad and that the printer had a right to refuse to print homosexual material if it infringed on his basic religious beliefs.²⁸ Ultimately, the same decision was reached with the unfortunate key difference being that the issue on trial was transformed from a determination of whether the printer had discriminated against an individual, into a judgment on the validity of the printer’s religious beliefs. The court declared its authority to subjectively judge the legitimacy of the printer’s beliefs and found them insufficient to warrant a refusal of his printing services.²⁹ The court’s decision in this case set a disturbing precedent, giving the government the power to review the validity of a citizen’s personal convictions to determine if they form a justifiable defense against charges of discrimination.

In France, there is evidence that even Holocaust denial criminal statutes can produce perverse, unintended effects. Professor Julie Suk examines the case of Robert Faurisson, a well-known Holocaust denier in France who has been repeatedly convicted for making statements denying the occurrence of the Holocaust.³⁰ Professor Suk describes the repeated efforts of the French state to enforce its Holocaust denial ordinances against the conspiracy theorists, and how there is currently no end in sight for the dissemination of such statements asserting that the Holocaust is a historical fabrication.³¹ The trials and convictions of Holocaust deniers ironically function to provide the defendants a wider platform to broadcast their noxious views. Similarly, Professor Lyrissa Barnett Lidsky argues that punishment of Holocaust denial can paradoxically strengthen the beliefs of Holocaust deniers rather than weaken them.³² Professor Lidsky argues that Holocaust denial is essentially a conspir-

²⁶ Canadian Charter of Rights and Freedoms, Sec. 2, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c.11.

²⁷ See *Brillinger v. Brockie* (No. 3) (2000), 37 C.H.R.R. D/15 (Ont. Bd. Inq.).

²⁸ See *Brillinger v. Ontario Human Rights Commission* (2002) 222 D.L.R. (4th) 174.

²⁹ *Ibid.*

³⁰ Julie C. Suk, “Denying Experience: Holocaust Denial and the Free-Speech Theory of the State,” in Michael Herz and Peter Molnar, eds., *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge: Cambridge University Press, 2012).

³¹ *Ibid.*

³² Lyrissa Barnett Lidsky, “Where’s the Harm?: Free Speech and the Regulation of Lies,” *Washington and Lee Law Review* 65 (2008): 1091–101.

acy theory; it reflects a belief that “they” (the controlling powers) want you to believe in the Holocaust in order to achieve “their” selfish political ends.³³ Accordingly, denial of a conspiracy theory can become proof that it exists, at least for its adherents. The perverse result, she contends, is that the punishment of Holocaust denial is likely to lend it legitimacy, at least for those who are susceptible to its lure in the first place.

Holocaust denial laws can inadvertently bolster the views they are meant to criminalize in other ways as well. Fundamentally, the very existence of a Holocaust denial criminal statute theoretically ensures and preserves the existence of Holocaust denial as a concept and as a movement. Holocaust denial laws presuppose and are predicated upon the implicit belief that Holocaust deniers have and always will exist. Moreover, the existence of such laws conveys that the power of Holocaust denial is of such magnitude that it must (and possibly can only) be countered by the power and force of law. These laws can very well be read as the reverse institutionalization and prescription of the very beliefs they are meant to prohibit.³⁴

What is likely to happen where Holocaust denial is criminalized? Are those who are attracted to Holocaust denial as a theory likely to simply abandon it just because the state prohibits it? Instead, are they likely to turn away from public discourse to find a community of like-minded individuals who will reinforce their beliefs? The Internet makes that community easy to find. An array of websites readily supplies “evidence,” “confirming” that the Holocaust never happened.³⁵ Several Middle Eastern countries, including Iran and Syria, officially promote Holocaust denial in their state-controlled media, including media accessible on the Internet.³⁶ In view of the ready availability of these sources, it is unlikely that a state’s attempt to suppress the Holocaust denial agenda from public conversation will be successful; instead it will merely free believers from the necessity of having to defend their views in civil society and encourage them to find underground networks of like-minded individuals. Punishing Holocaust denial can thus strengthen rather than weaken the convictions of believers. On this basis, should the state resist the temptation to punish Holocaust denial?

The tendency of hate speech laws to produce such perverse results raises the question of their utility. Such laws are problematic because they position the state as the arbiter and guardian of social injuries and cultural conflicts. They create the illusion that the state can contain the issue and con-

³³ Ibid., 1100–101.

³⁴ For an excellent analysis of issues of censorship and the concept of prescription through prohibition, see, e.g., Judith Butler, *Excitable Speech: A Politics of the Performative* (New York: Routledge, 1997).

³⁵ Lidsky, “Where’s the Harm?”

³⁶ Ibid.

trol the offense while masking the true cultural and societal causes of hate speech and intolerance. Hate speech laws can exacerbate and amplify social conflicts inasmuch as the state's response or nonresponse to an offense is often manipulated for political ends. If a state were to eliminate hate speech laws, would the state be freed from its obligation to police and define social injuries that warrant punishment? As observed from the examples of the hate speech laws of Denmark, Canada and France, the state is not always the best judge of these social injuries. Could these injuries and conflicts be better resolved and better addressed through civil society? Is it in the interest of the state to outsource and to privatize to civil society the regulation of essentially personal, social and ethical norms?

Are these questions too unconventional, too radical for a constitutional democracy to confront? As Professor Péter Molnár has observed, the Constitutional Court of Hungary and the Supreme Court and lower courts of Hungary have directly addressed these questions.³⁷ Hungary, of course, experienced a history in the 20th century fundamentally no different from that of its European neighbors. But Hungary chose a very different path from its European neighbors. In a word, Hungary hews rather closely to the American model. The US Supreme Court has given voice to the self-denying ordinance: "[G]overnment may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."³⁸ And elsewhere, "[T]he First Amendment generally prevents the government from proscribing speech . . . because of disapproval of the ideas expressed."³⁹ Professors Suk, Jacobson and Schlink all note the American absolutism against criminalizing hate speech as expressed in *R.A.V. v. City of St. Paul*⁴⁰ and the Skokie, Illinois, case, *Collin v. Smith*.⁴¹ Hungary shares America's practice of providing strong protections for freedom of speech.

³⁷ Peter Molnar, "Towards Improved Law and Policy on 'Hate Speech': The 'Clear and Present Danger' Test in Hungary," in Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009), 237, 240.

³⁸ *Texas v. Johnson*, 491 U.S. 397, 414 (1989): "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

³⁹ *R. A. V. v. City of St. Paul*, 505 U.S. 377, 382 (1992): "The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed"; *Collin v. Smith*, 578 F.2d 1197, 1202 (7th Cir. 1978): "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

⁴⁰ *R. A. V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

⁴¹ *Collin v. Smith*, 578 F.2d 1197, 1202 (7th Cir. 1978), invalidating Skokie's hate speech ordinances enacted to prevent a march of uniformed Nazis displaying swastikas to protect the sensibilities of the large Jewish population.

It was the Constitutional Court of Hungary that departed from the response of other postcommunist countries. A provision of the Hungarian Criminal Code punished any public speaker before a large audience who used language that was offensive or denigrating to a religion or race. The Constitutional Court declared that law unconstitutional. A different provision of the Criminal Code, however, also punished a public speaker before a large audience who used speech that incited hatred on the basis of race or religion. In construing that incitement law, the Constitutional Court narrowed its application to only that speech that posed a clear and present danger that threatened individual rights.⁴² The Hungarian Supreme Court and lower courts further narrowed the clear and present danger test by linking it to violence. Only if the conditions of inciting violence are met may speech be punished.

In the name of freedom of expression, Hungary has declined to criminalize anything except hateful speech that incites violence.⁴³ This differentiates Hungary from its neighbors in its freedom of speech jurisprudence. The Constitutional Court was quite clear in its statement:

[H]istorical experience shows that on every occasion when the freedom of expression was restricted, social justice and humankind's innate ability to develop was stymied. . . . Free expression of ideas or beliefs, free manifestation of unpopular or unusual ideas is the fundamental requirement for the existence of a truly vibrant society capable of development.⁴⁴

Thus Hungary, which might have been expected to conform to the near-uniform European practice of criminalizing hate speech, adopted a different path. Whether and to what extent it was directly informed by American jurisprudence is another question.

The influence of American jurisprudence on Japan's approach to freedom of expression is less ambiguous. After the Allies' victory in World War II, America occupied Japan from 1945–52 and drafted Japan's postwar Constitution, which established the legal right to free expression for the first time in Japan's history.⁴⁵ Japan's new postwar Constitution guaranteed the right of freedom of expression in Article 21, which states, "Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. . . . No censorship shall be maintained, nor shall the secrecy

⁴² Molnar, "Towards Improved Law and Policy on 'Hate Speech,'" 237, 247.

⁴³ Ibid., 252.

⁴⁴ Ibid., 248.

⁴⁵ Lawrence W. Beer, "Postwar Law on Civil Liberties in Japan," *UCLA Pacific Basin Law Journal* 2.1–2 (1983): 98.

of any means of communication be violated.”⁴⁶ Since then, Japan has followed the American model and has adhered to a strong policy protecting freedom of expression, refusing to criminalize nonviolent hate speech. Japan’s vigorous rejection of constraints on expression was illustrated in 2002 and again in 2005, when it rejected a proposal for a new human rights law.⁴⁷ The proposed law would have created a Human Rights Commission under the government to, among other functions, investigate and penalize discriminatory practices and hate speech by private citizens. While the anti-discrimination provision received little political opposition, the hate speech provision was the target for vehement political and popular objections due to its proposed government enforced affirmative remedies of injunctions and mandatory retractions.⁴⁸ The bill did not survive political resistance long enough to even be voted upon and another version of the bill also failed to pass in 2005.⁴⁹

The Hungarian, American and Japanese approach signifies a healthy skepticism about the effectiveness of the state in modifying human thought and behavior. These different countries remain wary of the proposition that the state should arrogate to itself the power to punish expression that offends the religious or racial sensibilities of a few. In regards to hate speech laws, their laissez-faire approach recognizes the potential dangers of commandeering the criminal justice system into adjudicating questions of mere political correctness. In particular, they recognize the looming danger of a lack of limits to the seemingly boundless power of the state to punish (or not punish) expression that it will have the sole authority to deem offensive.

Then there is the problematic question of statutory construction of hate speech laws. For example, the two Danish statutes on which the eleven Muslim groups relied on to demand indictment of *Jyllands-Posten* are typically broad and vague. Section 266(b) criminalizes statements “insulting or degrading a group . . . on account of their race . . . or beliefs.”⁵⁰ Section 140 punishes those who ridicule or insult “the dogmas or worship of any lawfully

⁴⁶ Ibid., 100.

⁴⁷ See “LDP Forgoes Immediate Diet Submission of Human Rights Bill,” *Japan Policy and Politics*, 16 May 2008; see also Japan Civil Liberties Union, “National Human Rights Commission for Japan,” *Universal Principle* 10 (2002).

⁴⁸ Ibid., 6.

⁴⁹ See e.g., Japan Federation of Bar Associations, “Written Information Submitted for the Summary of the Human Rights Situation in Japan to be Prepared by the United Nations Office of High Commissioner for Human Rights, 8 February 2008, http://www.nichibenren.or.jp/library/ja/kokusai/humanrights_library/upr/data/ohchr_upr_houkoku_en.pdf; see also Koshi Yamazaki, “Proposed Human Rights Commission in Japan: A Critique,” *Focus* 39 (2005) (originally published in *Sekai* 739 [2005]), <http://www.hurights.or.jp/archives/focus/section2/2005/03/proposed-human-rights-commission-in-japan-a-critique.html>.

⁵⁰ Strfl. 266b(1), translated in Jensen et al., *The Principal Danish Criminal Acts*, 64.

existing religious community.”⁵¹ Is it fair to regard these and similar statutes as ambiguous, vague, and, certainly, overbroad? How mocking or degrading must the statement be? How deliberate or scornful must an insult be? Do these statutes ensnare some speech that was never intended to be criminalized? Are serious works of scholarship, history or art liable to be punished? Should satire ever be criminalized? Are governments and courts well suited to determine questions of offensiveness or insensitivity?

Courts in Hungary, Japan and the United States seem to recognize the fallibility of the state and themselves in answering these questions as guarantors of taste, judgment and sensitivity. They also appreciate that endorsing hate speech legislation appeals to many elements in the political class. Does such endorsement offer the legislator the illusion that some public good is being accomplished? Is there an element of posturing in order to gain public favor and political capital? In such cases of political endorsement of hate speech bills, it is evident that such legislative action may be more symbolic than substantive and that such bills offer an emotional and symbolic appeal at the expense of practical utility in reducing hate speech.

The Danish controversy illustrates another tendency of hate speech disputes; political interest groups can manipulate a hate speech controversy by portraying the government's action or inaction as evidence of a political position favoring one group at the expense of another. The censor's pen has more than once produced precisely the opposite effect. In the fall of 2009, Switzerland experienced a nasty political campaign.⁵² A referendum was on the ballot to consider a constitutional amendment banning the construction of new minarets.⁵³ In the referendum campaign anti-Muslim activists created provocative posters arguing for a “yes” vote on the referendum. One showed a Muslim woman wearing a black abaya standing next to several minarets standing on the Swiss flag. The minarets looked for all the world like intercontinental ballistic missiles, xenophobically transformed into an explicit symbol of violence and terrorism.⁵⁴

Predictably, some Swiss municipalities censored the posters and refused to allow their posting on public grounds. Just as predictably, the anti-Muslim activists promptly created and posted a new poster which exploited the government's action by shifting attention away from the issue of racial discrimination to the issue of government censorship. It said, “Censorship, one

⁵¹ Strfl. 140, translated in Jensen et al., *The Principal Danish Criminal Acts*, 45.

⁵² Nick Cumming-Bruce, “Swiss Ban Building Minarets on Mosques,” *New York Times*, 30 November 2009, A6.

⁵³ Ibid.

⁵⁴ Imogen Foulkes, “Switzerland to Vote on Plan to Ban Minarets,” *BBC News*, 27 November 2009, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/8381274.stm>.

more reason to say yes to the minaret ban.”⁵⁵ Over 57% of the voters voted “yes” to ban further construction.⁵⁶ Whether the official suppression of the posters perversely contributed to the result is hard to quantify. At the least, it illustrates the hazards the government faces when it acts in controversies that are fundamentally religious, racial or cultural. Hate speech laws can dangerously obscure the complexities causing social offenses by creating a false sense of security in permitting citizens to abdicate their personal civic responsibility in the illusion that the government is capable of suppressing hate speech. It is perhaps this paternalism which drives the enactment and enforcement of hate speech laws and correspondingly produces infantilism in the citizenry.

IV. Civil Society as an Alternative to Government Intervention

The problem of hate speech and its social and cultural causes may be more effectively combated through civil society rather than the government. Admittedly, it is uncertain whether civil society’s regulation will be any more or less predictable than that of government. Given, however, the recognition of the clear and dangerous unpredictability of regulation by government, and the tendency of government action to be driven or manipulated by corrosively politically interests, civil society may be the lesser of two evils as the less dysfunctional regulator.

Professors Jacobson and Schlink admirably describe the capacity of three elements of civil society—the workplace, standards and practices in the broadcast media, and campus speech codes—as illustrative of the civil society antidote.⁵⁷ They focus on American institutions within civil society and do not purport these to be the exclusive solutions. They do, however, illustrate the ways that civil society can be a productive alternative to government regulation of hate speech.

For example, there is a rich American tradition of popular outrage at some celebrities’ use of racial slurs. To give three examples from show business in America: radio host Don Imus, comedian and actor Michael Richards, and NBA Los Angeles Clippers team owner, Donald Sterling, each publicly

⁵⁵ Patrick Goodenough, “Attempts to Ban Minarets Sparks Censorship Controversy in Switzerland,” *CNS News*, 19 October 2009, <http://cnsnews.com/news/article/attempt-ban-minarets-sparks-censorship-controversy-switzerland>.

⁵⁶ Cumming-Bruce, “Swiss Ban Building Minarets on Mosques.”

⁵⁷ Arthur Jacobsen and Bernhard Schlink, “Hate Speech and Self-Restraint,” in Michael Herz and Peter Molnar, eds., *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge: Cambridge University Press, 2012).

uttered racial slurs; each suffered considerable public disapproval, and each suffered serious financial damage to their careers.⁵⁸

Outside of the US, there are other examples of civil society resolutions. In England, the Press Complaints Commission, a self-regulatory body for the newspaper industry, received protests from Muslim groups in 2004.⁵⁹ The Muslim groups objected to a series of explicitly anti-Muslim newspaper columns written by an employee of the British Council.⁶⁰ The protests resulted in the columnist's dismissal from his job with the British Council, but in no criminal charges against him.⁶¹

In Spain, the black British Formula One auto racing driver Lewis Hamilton was racially taunted on two occasions by Spanish racing fans.⁶² The Fédération Internationale de l'Automobile, the international racing governing body, warned the Spanish race organizers that it would cancel a race in Barcelona unless the organizers controlled the Spanish fans.⁶³

In Japan, a lurid magazine-book was published in 2007, crudely depicting foreigners (*gaijin*) as "dangerous," "evil" and disproportionately responsible for violent crimes.⁶⁴ Among the targets were Chinese, Americans, South Koreans, whites and blacks. Since Japan had, on constitutional grounds, interposed a reservation to the International Covenant on the Elimination of All Forms of Racial Discrimination, the government lacked the hate speech laws which might otherwise have been deployed to punish this xenophobic publication.⁶⁵ Japan's civil

⁵⁸ Paul Farhi, " 'Seinfeld' Comic Richards Apologizes for Racial Rant," *The Washington Post*, 21 November 2006, http://www.washingtonpost.com/wp_dyn/content/article/2006/11/21/AR2006112100242.html; Matea Gold, "Imus Show Is Suspended As Furor Mounts," *Los Angeles Times*, 10 April 2007, <http://articles.latimes.com/2007/apr/10/nation/na-imus10>; THR Staff, "Donald Sterling Controversy: Several Sponsors Ending Partnership With L.A. Clippers," *The Hollywood Reporter*, 28 April 2014, <http://www.hollywoodreporter.com/news/donald-sterling-controversy-sponsors-ending-699303>.

⁵⁹ "Anti-Islam Articles Officer Fired," *BBC News*, 2 September 2004, http://news.bbc.co.uk/2/hi/uk_news/3620982.stm.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Lewis Hamilton, "Spanish Grand Prix Racism Claims to Be Investigated by FIA," *The Guardian*, 10 May 2009, <http://www.guardian.co.uk/sport/2009/may/10/lewis-hamilton-racism-spanish-grand-prix>.

⁶³ Ibid.

⁶⁴ Arudou Debito, "Gaijin Hanzai Magazine and Hate Speech in Japan: The Newfound Power of Japan's International Residents," *The Asia-Pacific Journal: Japan Focus*, 19 March 2007, <http://www.japanfocus.org/-Arudou-Debito/2386>.

⁶⁵ UN Commission on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination, 3, U.N. Doc. CERD/C/304/Add.114 (27 April 2001), <http://www.universalhumanrightsindex.org/documents/824/420/document/en/pdf/text.pdf>.

society response took the form of a robust Internet protest campaign by non-Japanese residents to boycott the retail outlets which sold the publication.⁶⁶ The foreign bloggers succeeded in forcing the retailers to pull the magazine-book from their shelves.⁶⁷ Neither the Japanese government nor the domestic media played a role in combating what was undeniable hate speech.

V. Conclusion

These examples of civil society responses illustrate the random, unpredictable but nonetheless effective assertions of civil society's suppression of hate speech. Such suppressions make no pretense of affording either due process or proportionality in their sanctions. We conclude, however, that these responses of civil society, even with their infirmities, are ultimately to be preferred to what we know of the infirmities of state-sponsored suppression. The hate speech laws which form the architecture of such government suppression necessarily entangle government involvement in social and cultural conflicts. They dangerously force governments to take speciously decisive and authoritative stances on social tensions by regulating and punishing certain verbal offenses. Is the state best suited to define, regulate, censor and punish the social injuries and verbal offenses of hate speech? The evidence, on closer examination, does not appear to support such a claim. Indeed, only to the extent that the state abandons its paternalism may civil society be allowed to mature enough to accept and effectively perform its responsibilities of fairly preserving the freedoms and rights of every citizen.

⁶⁶ Debito, "*Gaijin Hanzai* Magazine and Hate Speech in Japan."

⁶⁷ Ibid.

The UN Defamation of Religions Resolution and Domestic Blasphemy Laws in Pakistan: Creating a Culture of Impunity

ASMA T. UDDIN

I. Introduction

“The Danish Cartoons Controversy: Hate Speech Laws and Unintended Consequences,” Richard N. Winfield and Janine Tien’s contribution to this volume, raises critical questions about the relationship between the state and religion. The authors focus on the Danish cartoon controversy as a representative example of the pitfalls and unintended consequences of hate speech and blasphemy laws; they argue that the global Danish cartoon controversy became as such largely because of the government’s entanglement in the affair—an entanglement that necessarily, even if unfortunately, flowed from the existence of hate speech and blasphemy provisions in its Criminal Code.

The authors extend their analysis to Hungary and Japan, noting that each of these countries chose to accept a jurisprudential model that vigorously protects free expression. The courts in each of these countries recognized the slippery slope consequences of limiting one form of peaceful speech. While the contrast between these two countries and much of the rest of Europe provides important insight, an analysis of the unintended consequences of state control of speech would not be complete without a look at the United Nations Defamation of Religions Resolution (hereafter, “Resolution”) and its domestic counterparts in countries like Pakistan. The argument that state control of speech produces unintended consequences is particularly exemplified in the case of the Resolution and blasphemy laws. Blasphemy law case studies from Pakistan, whose representatives at the Organisation of the Islamic Conference (OIC) played a principal role in pushing the Resolution forward, help answer perhaps the most key Winfield and

Tien question: "Is the state best suited to define, regulate, censor and punish the social injuries and verbal offenses of hate speech?"

II. The Danish Cartoon Controversy

The extent to which the state can interfere in matters of religion is a matter of delicate balance, with the preferable tilt being toward fewer regulations—states should protect religious belief to the extent needed for religious expression to flourish.

Indeed, this is the theme of Winfield and Tien's chapter. They start by laying out the relevant law: the Danish hate speech law, Section 266(b) of the Code, punishes "any person, who publicly . . . makes a statement . . . insulting or degrading a group of persons on account of their race . . . or belief." The provision imposes criminal penalties on violators, as does Section 140, the Danish blasphemy law, which penalizes "any person who, in public, mocks or scorns the religious doctrines or acts of worship of any lawfully existing religious community."

These laws empower public prosecutors to prosecute news organizations like the *Jyllands-Posten* for ridiculing Islamic doctrines and rituals. In the wake of the cartoon controversy, 11 Danish Muslims groups seized upon these provisions and filed a criminal complaint against *Jyllands-Posten*, transforming what had been a social issue into a legal and governmental one. Worse yet, the prosecutors' eventual rejection of the complaint predictably angered the plaintiffs and their constituency as it appeared to ignore a clear-cut violation of Sections 266(b) and 140 of the Danish Criminal Code. The rejection represented blatant anti-Muslim bias—the legal basis for the complaint was there but the political will was not. From this arose an outcry that reverberated among Muslim communities across the world. The very existence of the laws not only created a problem but created one they could not solve.

So why were the laws enacted in the first place? As Winfield and Tien point out, the Danish hate speech and blasphemy laws are vague and overly broad, making them especially prone to politicization. Undefined terms like "insult," "degradation," "mockery," and "scorn" are left to the state to interpret as best suits its own purpose. The laws are treated as political instruments. And the mere existence of such unenforceable laws serve less of a practical end than to help support the state's legitimacy, credibility, or symbolic national identity.

Pakistan's blasphemy laws provide an example of precisely this—the way in which these laws are interpreted and applied demonstrate the impropriety of putting the state in charge of determining religious truth and punishing dissenters. Impunity thrives as a result of these laws.

III. Blasphemy Law Case Study: Pakistan

Pakistan's draconian blasphemy laws have made international headlines numerous times in recent years. Two high-ranking government officials were assassinated because of their opposition to these laws, and the first woman to be sentenced to death for blasphemy in Pakistan currently sits in jail, waiting for an appeal that will likely take years.

Sections 295–98 of Pakistan's Penal Code contain the bulk of the nation's blasphemy laws. Section 295C prescribes the death penalty or life imprisonment, in addition to a fine, for derogatory remarks about the Prophet Muhammad.¹ The offense can be committed through spoken or written words, "visible representation or by any imputation, innuendo, or insinuation" which "directly or indirectly" defames the Prophet.² Though no one has actually received the death penalty for blasphemy, the existence of this law has emboldened vigilantes to take it into their own hands and murder supposed blasphemers. For example, in 2009 eight Christians were killed in the village of Gojra after an accusation that Christians had desecrated a Quran.³ The vigilantes also injured 18 people and burned two churches and about 75 houses.

Every blasphemy offense is punishable by imprisonment, either in place of or in addition to a fine.⁴ For example, Section 295A relates to the "deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs."⁵ This includes spoken and written words, and visible representations. The punishment for such insults is a fine and/or imprisonment for up to ten years.⁶ The law is rarely enforced against speech that offends the feelings of religious minorities.⁷

The language in these and many of the other blasphemy sections is vague and overly broad. In addition to punishing spoken and written words and "visible representations," the statutes also punish sounds, gestures, and the placement of objects, along with indirect defamation, such as innuendos and insinuations. Because it is not always clear from the language what con-

¹ Pakistan Penal Code (Act XLV of 1860), <http://www.unhcr.org/refworld/country,LEGAL,,LEGISLATION,PAK,4562d8cf2,485231942,0.html>.

² *Ibid.*

³ US Commission on International Religious Freedom, *Annual Report 2011* (Washington, DC: US Commission on International Religious Freedom, 2011), 114, <http://www.uscirf.gov/sites/default/files/resources/book%20with%20cover%20for%20web.pdf>.

⁴ Pakistan Penal Code (Act XLV of 1860).

⁵ *Ibid.*

⁶ *Ibid.*

⁷ US Department of State, *International Religious Freedom Report 2010: Pakistan*, <http://www.state.gov/g/drl/rls/irf/2010/148800.htm>.

stitutes a violation, local officials make the determination based on their own interpretation of Islam.⁸

Not only are the laws themselves vaguely worded, but the burden of proof for those accusing another of blasphemy is frighteningly minimal. The laws do not require proof of intent nor do they require evidence be presented.⁹ There are no penalties for false allegations, making them easy tools to use for threatening.¹⁰ A 2005 law requires a senior police officer to investigate blasphemy accusations before a complaint is filed, but this law is not uniformly enforced.¹¹ The lack of clarity and procedural rules have made these laws ripe for abuse.

The broadest of these statutes is Section 298C, which forbids members of the Ahmadiyya, an offshoot of Shi'a Islam, from calling themselves Muslims or propagating their beliefs; it bans the defamation of Muslims in "any manner whatsoever."¹² The direct or indirect propagation of the Ahmadiyya faith, as well as the adoption of any mainstream Muslim practices by Ahmadiyya adherents, is considered blasphemy of Islam.¹³ Among other things, it is a crime for them to perform the Muslim call to prayer, publicly quote from the Quran, or display any basic affirmation of the Muslim faith.¹⁴

According to the US State Department, a total of 1,032 people have been charged under the blasphemy laws between 1987 and 2009.¹⁵ Most blasphemy cases in Pakistan are brought against the Ahmadiyya, Christians, and Muslims, including Orthodox Sunni Muslims. The National Commission for Justice and Peace, a Catholic human rights group in Pakistan, has stated that, in 2009 alone, there were 112 people accused of blasphemy: 57 Ahmadis, 47 Muslims, and 8 Christians.¹⁶ According to the US Commission on Religious Freedom's 2011 report, more blasphemy cases are brought against Muslims than any other faith group.¹⁷ Religious minorities are a common victim of the laws, and they are often targeted by personal and business rivals, as well as authorities, who use the laws as a tool for personal revenge.

The threat of blasphemy is also often used as a means of harassment in property disputes.¹⁸ For example, in December 1999, a mob of sev-

⁸ US Commission on International Religious Freedom, *Annual Report 2011*, 115.

⁹ Ibid.

¹⁰ Ibid.

¹¹ US Department of State, *International Religious Freedom Report 2010: Pakistan*.

¹² Pakistan Penal Code (Act XLV of 1860).

¹³ Ibid.

¹⁴ US Commission on International Religious Freedom, *Annual Report 2011*, 117.

¹⁵ US Department of State, *International Religious Freedom Report 2010: Pakistan*.

¹⁶ Ibid.

¹⁷ US Commission on International Religious Freedom, *Annual Report 2011*, 115.

¹⁸ "Pakistani Christian Charged with 'Blasphemy' for Text Message," *The Christian Post*, 10 February 2009, <http://www.christianpost.com/Intl/Persecution/2009/02/pakistani-christian-charged-with-blasphemy-for-text-message-10/index.html>.

eral hundred people looted and burned the home of Mohammad Nawaz, a local Ahmadi leader and medical doctor, in the Haveli Lakha, Okara district of Punjab.¹⁹ Nawaz was accused of planning the construction of an Ahmadi house of worship, though he insisted that he had intended to use the building as a free clinic, located next to his home, where he could see patients.²⁰ The accusation reportedly came from a neighbor who incited the mob after the two became embroiled in a property dispute.²¹ The police arrived at the scene as the mob burned down Nawaz's home but refrained from stopping the crowd—an unfortunately typical response.²² The perpetrators were not punished, yet Nawaz and his two sons were arrested and charged with blasphemy.²³

Violence against Ahmadis overall is strikingly high. On 28 May 2010, unknown terrorists attacked two Ahmadi mosques in Lahore with automatic weapons, grenades, and other explosive devices during Friday prayers, killing more than 86 people and injuring at least 124.²⁴ Though police eventually gained control over the situation, Pakistanis in Lahore reported that the elite Rangers military units had been called yet ordered not to intervene.²⁵

Stifling religious liberty goes hand-in-hand with an overall stifling of freedom of speech in Pakistan. The Pakistani High Court in Lahore has imposed restrictions on speech under the blasphemy law. In May 2010, the Court temporarily banned Facebook, YouTube, and Wikipedia due to what it perceived to be increasingly “sacrilegious content.”²⁶ This was partly in response to a Facebook group called “Everybody Draw Muhammad Day!” that was created after the cartoon show *South Park* depicted the Prophet Muhammad wearing a bear suit. The Court's decision to ban these websites was based on fear that such depictions would ignite violence throughout the country similar to that which occurred during the Danish cartoon controversy. But the Court erred in punishing the speaker—all speakers who may wish to use those websites no matter what message they want to share—for fear of what violent actors might do.

In recent years, efforts were made by some leaders in Pakistan to repeal the blasphemy laws. Two leading government officials who opposed these laws, Punjab governor Salman Taseer, and Minister for Minorities Affairs Shahbaz Bhatti, were assassinated specifically because of their views and

¹⁹ US Department of State, *International Religious Freedom Report 2002: Pakistan*, <http://www.state.gov/g/drl/rls/irf/2002/14026.htm>.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ US Department of State, *International Religious Freedom Report 2010: Pakistan*.

²⁵ US Commission on International Religious Freedom, *Annual Report 2011*, 114.

²⁶ Asma Uddin, “Pakistan's Facebook Ban Protects the Violent,” *Washington Post*, 21 May 2010, http://newsweek.washingtonpost.com/onfaith/panelists/asma_uddin/2010/05/pakistans_facebook_ban_protects_the_wrong_party.html.

efforts on this issue. On 2 January 2011, Governor Taseer was murdered by his own bodyguard, who had shared his assassination plot with other guards and had even been listed as a security risk by his supervisors.²⁷ Minister Bhatti was shot outside of his mother's home on 2 March 2011 by members of the Pakistani Taliban.²⁸ Though his security detail had recently been increased due to multiple death threats, he was denied multiple requests for an armed car.²⁹ Bhatti had been appointed by President Asif Ali Zardari to head a commission reviewing the blasphemy laws for possible reform.

Bhatti was also appointed to review the most prominent blasphemy case in the past several years, the case of Asia Bibi. Bibi is a Christian mother of five who was sentenced to death in November 2010 after some women who disputed with her over water while she was picking berries accused her of insulting the Prophet.³⁰ After reviewing her case, Bhatti had recommended that President Zardari pardon Bibi if her appeal did not move quickly.³¹ The Lahore High Court ruled, however, that Zardari cannot pardon a person whose case is on appeal. She remains in jail while her husband and children are in hiding due to death threats.

Since the murders of Taseer and Bhatti, reform attempts by certain Pakistani leaders have waned. In November of 2010, Sherry Rehman, a Pakistan People's Party (PPP) parliamentarian, proposed a bill that would include reforms such as removing the death penalty for blasphemy, criminalizing incitement to religious violence or discrimination, requiring intent for the crime of blasphemy, and ensuring penalties for false accusations.³² After the murders of Taseer and Bhatti, Rehman, who received death threats of her own, was pressured to withdraw the legislation.³³ Additionally, Prime Minister Yousaf Raza Gilani, who had previously expressed support for reviewing the laws, now insists that, though the government will not permit abuse, reform will not be considered.³⁴ Additionally, PPP officials have stated that any change in the law must be approved by a unanimous consensus, which further diminishes the chances of reform.³⁵

²⁷ US Commission on International Religious Freedom, *Annual Report 2011*, 112.

²⁸ *Ibid.*, 113.

²⁹ *Ibid.*

³⁰ Orla Guerin, "Pakistani Christian Asia Bibi 'Has Price on Her Head,'" *BBC News*, 7 December 2010, <http://www.bbc.co.uk/news/world-south-asia-11930849>.

³¹ US Commission on International Religious Freedom, *Annual Report 2011*, 115.

³² *Ibid.*, 116.

³³ *Ibid.*

³⁴ *Ibid.* There are some leaders who are expressing new willingness to review it. Fazlur Rehman, the leader of one of the most conservative religious parties in parliament, who was previously staunchly opposed to amending the laws, stated after the Bhatti assassination that he is ready to discuss the law if it is being used against minorities (*ibid.*, 117).

³⁵ *Ibid.*, 117.

The abandonment of reform efforts is due to protests, intimidation, and threats by religious and sectarian groups, as in the case of Sherry Rehman, who is now rarely seen in public. In addition to intimidating reformers, extremists often vow to personally kill those accused of blasphemy if the laws are repealed. The US Commission on International Religious Freedom reports that from April 2010 to March 2011 eight murders were associated with blasphemy, at least one of which occurred while the accused was in police custody.³⁶ Militants will often pack courtrooms, threatening violence if an accused person is acquitted, and judges and lawyers involved in such acquittals have been victims of threats and violence.³⁷ One radical cleric even offered a \$5,800 reward for anyone who murders Asia Bibi and suggested that the Taliban would likely want to do it.³⁸ He was not indicted for this incitement to violence.³⁹

While the murder of alleged blasphemers would occur with or without blasphemy laws, the fact that such laws are on the books bolsters the murderous tendencies of extremists. The government's failure to crack down on religiously motivated violence, a failure which has grown over the past year or so, emboldens them even more.

IV. UN Defamation of Religions Resolution⁴⁰

The murders of Taseer and Bhatti have brought greater attention to the international community's approach to blasphemy laws. For more than a decade, the UN Human Rights Council, and later the UN General Assembly, approved an anti-defamation Resolution, which, if made legally enforceable, would have served as an international anti-blasphemy law. To date, it has provided cover for oppressive nations with draconian domestic blasphemy laws. This Resolution, sponsored by the Organisation of the Islamic Conference (OIC), faced a significant decrease in support over the past few years,⁴¹ leading the OIC to first change the term "defamation" to "vilification," and when that

³⁶ Ibid., 116.

³⁷ US Commission on International Religious Freedom, *Annual Report 2011*, 115.

³⁸ Guerin, "Pakistani Christian Asia Bibi 'Has Price on Her Head.'"

³⁹ US Commission on International Religious Freedom, *Annual Report 2011*, 115.

⁴⁰ Portions of the discussion on the Resolution have been borrowed with permission from the author's working group paper, "Rethinking the 'Red Line': The Intersection of Free Speech, Religious Freedom, and Social Change," from the Brookings Institute's US-Islamic World Forum.

⁴¹ In its final year, 2010, the OIC's Resolution protecting religions passed by the narrowest margin yet. Seventy-nine countries voted for it, 67 voted against it, and 40 abstained. See Eric Rassbach and Ashley Samelson McGuire, "How the UN Encourages Religious Murder," *Wall Street Journal*, 7 February 2011.

failed to garner support, to drop the “defamation” language altogether and table an entirely new resolution much more respectful of religious freedom.

The original Defamation Resolution was proposed by Pakistan on behalf of the OIC in 1999 in the Human Rights Commission with the stated purpose of addressing racism. Since 2005, it had also been introduced at the General Assembly. The proposal was originally titled “Defamation of Islam,” and the OIC stated that it was necessary because of a campaign to denigrate Islam.⁴² The OIC feared that such a campaign would result in violence against Muslims to a degree similar to pre-World War II anti-Semitic violence in Europe.⁴³ The OIC also indicated a desire for a binding international covenant to make defamation a legal offense.⁴⁴

Support for the Resolution saw a rise after the September 11, 2001, terrorist attack and other events. Among these events were the murder of Theo Van Gogh, producer of the film *Submission*, the Danish cartoon controversy, and the Geert Wilder film *Fitna*, which interposed Quranic verses with images of terrorist attacks.⁴⁵ The OIC argued that such statements abuse the freedom of expression and constitute an act of racial or religious discrimination.

Yet the OIC made a serious error in lumping race and religion into the same category. Race is by its very nature intrinsic to a person and therefore not subject to alteration. Religion, by contrast, is by its very nature a philosophy and *not* intrinsic to an individual person. It is a matter of conscience; faith, reason, and conviction may lead one to change his religious beliefs and convert. Thus, because a person’s religious belief can be challenged and altered, dialogue and debate must be unhindered in society in order for individuals to freely assess their own beliefs.

Such reassessment of one’s faith can help keep it vibrant and relevant to changing circumstances. Yet criminalizing “defamation of religions” stifles such exploration and is thus destructive to religious reform. It chills religious speech not just in the context of interreligious dialogue, but also between members of the same faith who seek to explore and challenge their beliefs together with the laudable aim of spiritual and intellectual growth. Further, anti-religion speech can be difficult to define, and restricting it can unduly hinder controversial truth claims.⁴⁶

The idea of “defamation of religion” confuses and improperly expands the traditional understanding and purpose of criminalizing defamation. Traditional defamation laws protect *people* from false statements that injure

⁴² “Combating Defamation of Religions,” *Becket Fund for Religious Liberty Issues Brief*, 2 June 2008/updated 29 October 2009, 2.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, 11.

their reputation and livelihood, and these statements can be proven false through a factual defense. On the other hand, “defamation of religions” is, as described by its proponents, a false claim about an *idea*, rather than a fact. This poses a fundamental rule of law problem, as a belief cannot be empirically proven true or false.⁴⁷ Since the law can only address empirical truth claims, this is entirely beyond the scope of the state’s power and ability. Not only can the truth no longer serve as a defense, since it cannot be proved in this case, but, because the injury is against an idea rather than an individual, the Resolution is entirely at odds with the very nature of human rights.

The OIC’s anti-defamation Resolution failed to recognize that there are already international laws that do protect human rights at stake when it comes to religious discrimination. The International Covenant on Civil and Political Rights (ICCPR) acknowledges certain limits to free speech and religious expression which guard against the dangers to public order that the Resolution aims to prevent. Article 18 of the ICCPR states: “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”⁴⁸ Thus, existing international law clearly addresses legitimate state concerns about public order and incitement to violence. Overbroad defamation laws only serve to undermine the purpose that these existing laws sufficiently address.

Like the blasphemy and hate speech laws described by Winfield and Tien, the Resolution empowers the state to decide which religious viewpoints can be expressed and which cannot. This effectively puts the state in charge of determining religious truth and is thus contrary to the purpose of the international human rights system because it empowers the state instead of individuals. Under this framework, the state wields religious defamation, hate speech, or blasphemy laws to assert which interpretation of a given religion is “correct” and worth preserving and thus encroaches on the sovereignty of individuals and religious organizations to reach their own theological conclusions.

The broadness of the Resolution allowed it to be easily manipulated to infringe on related rights as well, such as free speech, free assembly, free association, and others. There is indeed an inverse relationship between excessive state power and the existence of democratic freedoms. Domestic blasphemy laws also appease violent extremists, as displayed in Pakistan, who is also a major supporter of the Resolution. Because they can argue that the law is on their side, they claim license to bully religious minorities or dissenters while the police turn a blind eye. This creates a culture of impunity where heinous crimes are committed with little or no consequences for the criminals.

⁴⁷ Ibid., 10.

⁴⁸ G.A. Res. 2200A (XXI), Art. 18, UN Doc. A/6316 (16 December 1966).

Thus, under these laws, the state de facto supports incidents of violence, even though the purpose of the laws is to reduce violence motivated by religion. Rather than punishing the speaker in order to prevent violence by others, the law should compel potentially violent people to control their own behavior—even in the face of insults. In American jurisprudence, this principle is called the “hostile audience” doctrine. The US Supreme Court has stated that “[a]s a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.”⁴⁹ In weighing the cost of imposing speech on unwilling listeners against the cost of preventing speech, the Court determined that the latter cost would be much greater.⁵⁰

Moreover, violence is far more effectively controlled if states enforce those laws which punish criminal behavior, such as laws against arson, murder, and other forms of intimidation and endangerment of religious persons. This sort of legal scheme also makes sense because it protects the fundamental human right to free religious expression. Individuals have the right to not only hold particular beliefs but also to express them openly in public—as long as they are peaceful and do not contravene the rights of others. This works in favor of the larger society rather than against it, as only in a free marketplace of ideas can those ideas with greater utility or persuasive power prevail.

In March of 2011, the UN Human Rights Council made significant progress in recognizing the fundamental right of human expression. In part because of the murders of Taseer and Bhatti in Pakistan,⁵¹ the OIC tabled a new Resolution that entirely foregoes the defamation language. Rather than protecting *religions*, it protects *religious persons*. The new Resolution, titled “Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence, and Violence against Persons Based on Religion or Belief,” encourages member states to address and combat “any advocacy of religious hatred against individuals that constitutes incitement or discrimination, hostility or violence.”⁵² Among other things, it calls on gov-

⁴⁹ *Boos v. Barry*, 484 U.S. 312, 322 (1988).

⁵⁰ Wojciech Sadurski, *Freedom of Speech and Its Limits* (Dordrecht: Kluwer Academic Publishers, 1999), 88.

⁵¹ US Commission on International Religious Freedom, “USCIRF Welcomes Move away from ‘Defamation of Religions’ Concept,” press release, 24 March 2011, <http://www.uscifr.gov/news-room/press-releases/uscirf-welcomes-move-away-defamation-religions-concept>.

⁵² United Nations General Assembly, Human Rights Council Resolution, A/HRC/RES/16/18, Adopted by UNHCR on 24 March 2011, Distr.: General, 12 April 2011, 2, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/127/27/PDF/G1112727.pdf?OpenElement>.

ernments to assist with mediation and conflict prevention between religious groups and to “criminalize incitement to imminent violence.” It was adopted in the UN Human Rights Council without a vote.

From this language, it can be concluded that the new Resolution does not have the same problems as the Defamation Resolution. Rather than protecting ideas, it protects individuals from being victimized, through violence or discrimination, because of the ideas they hold. Nothing in the language empowers states to determine theological truth; the state should combat “any” advocacy of religious hatred, which would include minority as well as majority religions. In this sense, it no longer provides cover for nations that persecute individuals for their beliefs. Further, this Resolution discourages the impunity that has resulted from blasphemy and defamation laws. For example, the Resolution encourages criminal prosecution for an incitement to imminent violence, such as the promise of a reward for anyone who murders Asia Bibi. Yet what the Resolution does not criminalize is speech, rightly leaving nonviolent religious conflict to be addressed on the societal level. Nations like Pakistan that have and regularly enforce draconian blasphemy laws should embrace the suggestions offered by this Resolution and begin to protect their citizens after decades of oppression and abuse.

Even with this momentous step forward, the battle over religious liberty at the UN is far from over. For one, diplomats from Muslim-majority countries have warned the UN Human Rights Council that they could return to advocating for an international religious defamation law “if Western countries are not seen as acting to protect believers.”⁵³ Moreover, while the shift in the resolution’s language is overwhelmingly positive and cannot be used to justify draconian blasphemy laws, certain phrases, such as “religious intolerance” are capable of being interpreted too broadly; thus the precise manner in which this Resolution is understood by various actors remains to be seen. Further, members of the OIC have insisted that this resolution does not in any way supersede the Defamation Resolution.⁵⁴ They even discussed proposing a resolution condemning “hate speech” against religions, which would amount to another anti-defamation resolution merely cloaked in different lan-

⁵³ Robert Evans, “Islamic Bloc Drops 12-Year UN Drive to Ban Defamation of Religion,” *Reuters*, 24 March 2011, <http://blogs.reuters.com/faithworld/2011/03/24/islamic-bloc-drops-12-year-u-n-drive-to-ban-defamation-of-religion/>.

⁵⁴ During the 24 March UN Human Rights Council session, Pakistani ambassador Zamir Akram stated, “I want to state categorically that this resolution does not replace the OIC’s earlier resolutions on combating defamation of religions which were adopted by the Human Rights Council and continue to remain valid.” See Patrick Goodenough, “UN Religious ‘Defamation’ Resolution Is Not Dead, Says Islamic Bloc,” *CNSNews.com*, 30 March 2011, <http://www.cnsnews.com/news/article/un-religious-defamation-resolution-not-dead-says-islamic-bloc>.

guage.⁵⁵ Fortunately, such attempts have been resisted; in November 2012, the UN Third Committee adopted a new text on religious tolerance that urged the international community to combat religious intolerance not through legal restrictions on speech, but through positive measures, such as open debate, human rights education, and intercultural and interfaith activities.⁵⁶

V. Is the State Best Suited to Define, Regulate, Censor and Punish the Social Injuries and Verbal Offenses of Hate Speech?

To return to Winfield and Tien's question, "Is the state best suited to define, regulate, censor and punish the social injuries and verbal offenses of hate speech?" the Pakistan example demonstrates the inherent dangers of state control of speech. Hate speech and blasphemy laws not only appease, rather than control, violent actors, but they also back up such acts with police power. Most of the persecution in regimes with active blasphemy laws actually comes from state action against religious minorities and dissenters who express viewpoints offensive to either the majority religious populations or to the government.

Blasphemy charges are motivated not just by actual or perceived blasphemy, but also by the desire to harass minorities or business rivals with whom the accuser may be involved in a dispute. The mere existence of such laws allows private citizens to take the law into their own hands and execute punishment without an official verdict. The laws communicate the message that individuals are justified in reacting with violence against those who propound allegedly blasphemous language, broadly and vaguely defined. While in some cases blasphemy laws were originally enacted to control public disorder, as applied, they not only lead to such disorder, but also help justify and exacerbate it. Such laws affect customary law—the so-called "law of the streets"—and create a culture of impunity where private citizens are often left without state protection against extremists or other criminals manipulating broad blasphemy provisions.

Another aspect of the Winfield and Tien question is that of suitability. The state is unsuitable to punish social injuries of hate speech because it

⁵⁵ Benjamin Mann, "UN Could Move to Target Criticism of Islam as 'Hate Speech,'" *Catholic News Agency*, 5 May 2011, <http://www.catholicnewsagency.com/news/un-could-move-to-target-criticism-of-islam-as-hate-speech/>.

⁵⁶ Human Rights First, "Human Rights First Welcomes New UN Text on Religious Tolerance," 22 March 2013, press release, <http://www.humanrightsfirst.org/press-release/human-rights-first-welcomes-un-text-religious-intolerance-calls-more-governmental>.

more often ends up politicizing broad hate speech and blasphemy laws and, in some countries, using those laws to persecute its citizenry. It is also unsuitable because it fails to solve the deeper underlying problems. Violence and public order, particularly against minorities, are better addressed through social solutions rather than legal sanctions.

Winfield and Tien, too, agree that civil society provides a more effective solution to hate speech. They point out that, in the US, the civil society response occurs primarily through regulation of proper workplace conduct, standards in broadcast media, and campus speech codes.

VI. Conclusion

While legal sanctions on nonviolent speech are reprehensible because they give the state undue control over its citizens' expression, some attention must be given to the sociological problem of the ways speech is used and manipulated. In dealing with hate speech, society must move past the question of legalities and consider the role of speech in its collective social responsibility; individuals need to formulate social—not legal—solutions to speech that aims to divide. After all, imposing legal restrictions simply takes the burden off individuals to moderate themselves; blasphemy laws, like hate speech laws, allow the citizenry to abdicate its civic responsibilities.

The new OIC-sponsored Resolution encourages this sort of social responsibility by ending its prior promotion of criminalizing speech. This, along with the thirst for freedom and democracy that has recently been displayed in Arab nations, suggests an overall movement toward greater respect for religious liberty.

A Right to Be Free from Religious Hatred? The *Wilders* Case in the Netherlands and Beyond

JEROEN TEMPERMAN

I. Introduction

Dutch Politician Geert Wilders, leader of the rightist Party for Freedom (PVV), was tried in relation to (religious)¹ defamation and hate speech charges in a case that lasted from 2009 to 2011. Ultimately, on 23 June 2011, he was fully acquitted.² The trial was in many respects a sensational one, not in the least because of the sheer fact that a politician was prosecuted over his public expressions; but also considering the peculiar situation that the Dutch Office of the Prosecution was prosecuting rather reluctantly. That is, initially the prosecutor on the case set the case aside, dismissing any allegations made,³ and essentially coming to the conclusion that there was nothing in Wilders's statements or behavior that might be deemed criminal. The Office of the Prosecution deemed some of Wilders's statements certainly "insulting to Muslims," yet said statements "were done within the context of public debate."⁴ The first unique twist—many would follow—to the saga came about when the Amsterdam High Court, thus urged by a group of stakeholders under what in

¹ The case also revolved around counts of incitement to discrimination of Moroccans and other non-Western immigrants, an aspect which is further ignored here.

² English summary of the Amsterdam District Court Decision, <http://www.rechtspraak.nl/SiteCollectionDocuments/Translation%20verdict%20Wilders%20230611.pdf>.

³ As will be discussed in more detail: particularly Wilders's anti-Quran film *Fitna* and several interviews in Dutch newspapers had resulted into a couple of dozen lodged complaints.

⁴ Arrondissementsparket Amsterdam, summary decision not to prosecute (decision of 30 June 2008), http://www.om.nl/onderwerpen/@148328/wilders_niet/.

Dutch law is called the “Article 12 Sv-procedure” (a penal code procedure that enables victims and other stakeholders to appeal to a prosecutorial dismissal of a case), overruled the Office of the Prosecution and essentially forced the latter’s hand. A case against Wilders was initiated after all.⁵ Accordingly, the High Court concluded *in abstracto* that there were sufficient indications that Wilders may have breached penal law provisions (on incitement, defamation and discrimination), thus deeming a prosecution viable. In the high-profile trial that ensued before the Amsterdam District Court, Wilders’s defense consisted of several preliminary defenses questioning the admissibility of the case (dismissed) and substitution requests (one was dismissed and one was in fact granted after it had transpired that the presiding judge had had dinner with an important witness to the case).⁶ Considering the fact that the Office of the Prosecution did not find the case a viable one from the outset, it came as no real surprise it ultimately requested a full acquittal.⁷ The prosecution came to this request, among other reasons, reasoning that the fact that something is insulting does not make it criminal. Also, it would have been clear enough in all impugned statements that Islam or the Quran was the subject of the verbal attacks—not Muslims. The prosecutorial considerations were expressly embedded in Dutch previous jurisprudence, but notably also in relevant case law of the European Court of Human Rights.⁸ The Amsterdam Court subsequently indeed fully acquitted Wilders, largely agreeing with the prosecutor, though it did not shy away from observing that Wilders did get dangerously close to that fine line between legal and illegal speech (“suspect balances on the border of what is accepted pursuant to criminal law”).⁹

Had Wilders lost the case, it would not have been hard to predict how it would continue from there on: after further exhaustion of the Dutch judicial remedies, the case would likely have ended up in Strasbourg before the European Court of Human Rights, with the latter body then being prompted to untangle the interplay between freedom of expression (especially of politicians), and the rights and reputations of others (in our case, religious minori-

⁵ Decision, Amsterdam High Court, 21 January 2009, http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=lijn&lijn=BH0496&u_ljn=BH0496.

⁶ Summary of the final prosecutorial request (of 25 May 2011; case 13/425046-09) for acquittal, http://content1b.omroep.nl/6eb33f40a8f838b12831dea80e06039c/4fd0040/nos/docs/250511_samenvatting_requisitoir.pdf.

⁷ It did so on two occasions: on 15 October 2010 and (when the case was resumed with new judges after the successful substitution request) again on 25 May 2011.

⁸ See p. 2 of said request for acquittal (*supra* note 6).

⁹ See decision *supra* note 2. This was observed in particular regard to his statement “a conflict is going on and we have to defend ourselves.” The court argued: “This incitement to people to defend themselves has a subversive character, also by the vehement wording. The connection with the remainder of the interview does not take away the provocative character of these vehement words.”

ties). Presently, however, it may be interesting to focus on the other side of the coin: how about the interests of the persons that considered themselves “victims” of hate speech in this and similar cases? Are those interests protected under international human rights law? And if so, could insufficient recognition thereof by states lead to actual breaches of human rights law? Specifically, is there a right to be free from religious hatred? In order to address these questions, we will first venture somewhat more into the background of the *Wilders* case, so as to understand the legal framework underlying the case, the stakeholders’ complaints, and the Dutch domestic judicial process and final outcome. Subsequently, the focus of this chapter is on international law, specifically international human rights law. Lastly, we will return once more to the Wilders trial, where we will see that one aspect thereof is still ongoing internationally: *did the Netherlands breach international human rights law by—allegedly—not adequately implementing its own hate speech legislation in the light of international standards?*

II. The *Wilders* Case

In the impugned interviews, a documentary (entitled *Fitna*) and other public statements Wilders has expressed criticism of Islam and of the Quran.¹⁰ The summons of the accused lists dozens of such statements made by Wilders.¹¹

Geert Wilders was charged with five counts,¹² two of which are relevant for the present purposes:

1. Inciting hatred against Muslims because of their religion;
2. Inciting discrimination against Muslims because of their religion.

These two charges draw on Article 137d of the Dutch Criminal Code:

1. He who publicly, verbally or in writing or in an image, incites hatred against or discrimination of people or violent behaviour against person or property of people because of their race, their religion or belief, their

¹⁰ Specifically, statements published by *De Volkskrant*, *De Pers*, *Dagblad De Limburger-Limburgs Dagblad* and on the Internet: on the website www.geenstijl.nl and/or www.pvv.nl and; on the website of Radio Nederland Wereldomroep; and on the website www.liveleak.com (where the film *Fitna* was uploaded by Wilders).

¹¹ English translation of the summons of the accused by Gatestone Institute, <http://www.gatestoneinstitute.org/951/summons-of-the-accused>.

¹² Not discussed here are the following charges: (religious) group defamation; inciting hatred against non-Western immigrants and Moroccans because of their race; inciting discrimination against non-Western immigrants and Moroccans because of their race.

gender or hetero- or homosexual nature or their physical, mental, or intellectual disabilities, will be punished with a prison sentence of at the most one year or a fine of third category.

2. If the offence is committed by a person who makes it his profession or habit, or by two or more people in association, a prison sentence of at the most two years or a fine of fourth category will be imposed.¹³

These Dutch Penal Code provisions are striking for a number of reasons. It is fair to point out from the outset, though, that states have opted for widely varying laws and policies in the area of incitement and defamation. That said, a number of western liberal democracies—arguably also as a counter-reaction to the recent “combating defamation of religion” agenda emerging within the political bodies of the United Nations¹⁴—have fairly recently replaced ancient blasphemy bills with higher-threshold religious hate speech legislation. In some of these countries, the political discussion leading up to this type of legislation revolved around the question of how tenable blasphemy bills remain today; for example, in the UK, the enacting of hate speech legislation went more or less hand-in-hand with striking the blasphemy offense off the statutes.¹⁵ In the Netherlands, although similar discussions over the tenability of ancient blasphemy provisions in the penal code were held; hate speech legislation has not replaced blasphemy legislation but rather ended up complementing the latter.¹⁶ Accordingly, what we see in the Dutch Penal Code now, are extensive provisions on all facets of religious defamation and religious hatred, ranging from

¹³ Article 137d of the Dutch Criminal Code (trans. Gatestone Institute).

¹⁴ This is a reference to the “Combating Defamation of Religions” resolutions adopted in recent years by the General Assembly and the Human Rights Council. They were also adopted previously by the former Commission on Human Rights. For criticism regarding these resolution, see, e.g., L. Bennett Graham, “Defamation of Religions: The End of Pluralism?,” *Emory International Law Review* 23 (2009); Sejal Parmar, “The Challenge of ‘Defamation of Religions’ to Freedom of Expression and the International Human Rights System,” *European Human Rights Law Review* 3 (2009); Jeroen Temperman, “Blasphemy, Defamation of Religions & Human Rights Law,” *Netherlands Quarterly of Human Rights* 26 (2008); Robert C. Blitt, “Defamation of Religion: Rumors of Its Death Are Greatly Exaggerated,” *Case Western Reserve Law Review* 62 (2011).

¹⁵ Blasphemy and blasphemous libel were abolished as common law offenses in May 2008 as per Article 79 of the Criminal Justice and Immigration Act 2008 (c. 4) (the abolishment entered into effect on 8 July 2008). The prohibition of incitement to racial and religious hatred was introduced as per the Racial and Religious Hatred Act 2006 (c. 1).

¹⁶ In 2009, a majority in the Dutch parliament expressed itself in favor of striking blasphemy off the Dutch Criminal Code; see Art. 147 and Art. 147a (on blasphemy and religious defamation), Art. 137c (on group defamation) and Art. 137d (incitement to hatred) of the Dutch Penal Code.

classic blasphemy provisions, to (religious) group defamation, to incitement to religious discrimination, to incitement to religious hatred.¹⁷

Further, Article 137d of the Dutch Criminal Code, the most relevant of all the Dutch incitement offences, appears to prohibit incitement against people on account of their adherence to a certain religion (“against [a] person . . . because of their . . . religion”). Thus, the *act of incitement* itself does not need to be religiously motivated for it to amount to a criminal offence. This makes sense: after all, *in abstracto* it should not matter what is actually motivating incitement for the state to be able to interfere when necessary (that is, if we could conclude that intervention *can at all be justified* for instance given the clear and present danger resulting from the speech—which is a separate matter). However, one salient aspect of the official Dutch translation of the UN International Covenant on Civil and Political Rights (ICCPR) is that the provision (Article 20, second paragraph) dealing with advocacy of religious hatred is translated in precisely that exclusive fashion, that is, seemingly solely aiming at *religiously motivated* hate speech (states must prohibit advocacy of “*op godsdienst gebaseerde haatgevoelens*,” meaning “religiously based feelings of hatred”).¹⁸

The Dutch Penal Code provision on (religious) hate speech does not correspond neatly to the official Dutch translation of relevant international legal standards. And the discrepancy just indicated is not the only one. Let us consider the Dutch example once more closely (Article 137d of the Dutch Criminal Code): “He who publicly, verbally or in writing or in an image, *incites hatred against or discrimination of people or violent behaviour against [a] person . . . because of their . . . religion*”¹⁹ This test—incitement of hatred against *or* discrimination of people—is remarkably different from the much more qualified international formulation as enshrined in the ICCPR: “Any advocacy of . . . religious hatred *that constitutes incitement* to discrimination, hostility or violence.”²⁰ Strictly speaking, the Dutch Penal Code provision prohibits advocacy of religious hatred *per se*; whereas international law prohibits certain—even more—extreme forms of hate speech, namely, those forms of advocacy of religious hatred that constitute incitement to discrimination, hostility or violence. The Dutch criminal law incitement provisions perfectly illustrate the fact that domestic processes of enacting hate speech legislation are rather tentative and often not informed by international benchmarks.

¹⁷ In addition to the provisions cited, see also Articles 147 and 147a, for blasphemy and religious defamation prohibitions and Article 137e of the Dutch Penal Code for other incitement offences.

¹⁸ An official Dutch translation of the ICCPR is available at http://wetten.overheid.nl/BWBV0001017/geldigheidsdatum_11-03-2011#VertalingNL.

¹⁹ Art. 137d of the Dutch Penal Code (translated in *The American Series of Foreign Penal Codes: Dutch Penal Code 133*) (emphasis added).

²⁰ ICCPR, Art. 20(2).

III. A Right to be Free from Hatred?

International law contains standards which make it compulsory for state parties to prohibit certain forms of extreme speech (notably, see Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and already mentioned Article 20 ICCPR). Presently, it is still unclear whether there exists *a right to be free from (religious) hatred*. This is not just a word play or a matter of terminology. True enough, where individuals have fundamental rights, states typically face a host of negative and/or positive obligations. The corollary would then also seem to hold true: wherever states face duties in the area of international human rights an individualizable legal entitlement may be discerned. Strictly speaking, however, the latter is not necessarily the case. Certain state duties may be codified as state duties *per se*—nothing more, nothing less. The main legal relevance of that distinct terminology is that in the latter case, yes, ratifying states are obliged to discharge certain obligations; but, no, individuals do not necessarily have *legal standing* before monitoring bodies to complain about alleged noncompliance (one of the admissibility criteria under many international human rights treaties is that applicants complain about an *existing right* enshrined in the substantive rights part of the treaty at stake).

Certainly, the way standards were formulated half a century ago by pioneering drafters of international law provides only one answer to our question of whether or not individuals are legally *entitled* to protection against certain forms of extreme speech. Far more legally relevant in ever evolving contemporary human rights law is in how international monitoring bodies construe these same standards nowadays. Let us, therefore, look at both the relevant positive international law and the workings of relevant monitoring bodies to answer our question.

A. Universal Declaration of Human Rights

One will find no clear predecessor of Article 20, second paragraph, of the ICCPR in the 1948 Universal Declaration of Human Rights, though there are some first hints.²¹ The final version of the UDHR, as adopted on 10 December

²¹ On the drafting history of the relevant UDHR Articles, see Stephanie Farrior, "Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech," *Berkeley Journal of International Law* 14:1 (1996); and Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting & Intent* (Philadelphia: University of Pennsylvania Press, 1999).

1948 by the General Assembly of the United Nations, contains in Article 19 the general right to freedom of expression:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The later to be adopted Article 19 ICCPR distinguishes more clearly between the *freedom of opinion* and the *freedom of expression*,²² and deems the former even more outspokenly absolute (and the latter subject to certain restrictions).²³ Also, where the drafters of the ICCPR later on saw it fit to gear multiple limitation clauses specifically toward the different rights and competing public goods, the drafters of the UDHR opted for *one generic* limitation clause in Article 29(2):

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Turning to the issue of “extreme speech,” whereas in the later (1966) ICCPR the general freedom of expression provision is immediately followed by the advocacy of hatred prohibition, thus implying their interrelatedness or interplay (as will be discussed in due course), in the UDHR we have to look elsewhere—in Article 7—and find only some marginal remnants of much more comprehensive hate speech clauses that were proposed in the UDHR drafting committees. Article 7 ostensibly deals with equality before the law, but ends with a note on incitement:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Two things are striking: (1) unlike the later ICCPR, the protection against incitement appears to be formulated as an *individual entitlement*; and (2) the protection is limited to protection against incitement to *discrimination* (the ICCPR also lists incitement to violence or hostility). Thus, under the UDHR

²² See Article 19(1) and 19(2) ICCPR.

²³ See Article 19(3) ICCPR.

“incitement” appears to be a narrower and a wider concept at the same time when compared to the later ICCPR. The exclusive focus on incitement to discrimination is narrow. Yet, the UDHR, much more so than the ICCPR, appears to provide a positive *right to be free from incitement* to discrimination (in the ICCPR, as we will see, the norm is rather formulated as a dictate aimed at states: all states must prohibit certain forms of incitement). The UDHR further contains a general *abuse of rights* clause in the final Article 30: “Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.” That general restriction, too, may have ramifications for free speech.²⁴

What “protection against incitement to discrimination” (Article 7 UDHR) means is not clear from the text. Specifically, under the Declaration it is not clear whether such “protection” can only be achieved through the adoption of a priori legal restrictions of free speech; it is further unclear whether states are indeed at all obliged to adopt hate speech legislation. Considering the more far-reaching and more explicit proposals to that effect that were rejected, one could *a contrario* reason that the ultimate formulation does not require the adoption of such legislation.²⁵ But if the incitement clause does not mean protection against incitement in the form of laws prohibiting incitement, then what exactly does the incitement proviso purport to achieve? It certainly means that states are permitted—albeit not overly enthusiastically encouraged and certainly not forced—to adopt hate speech legislation. Farrior likewise rather tentatively posits that the UDHR’s equal protection clause “arguably allows restrictions on hate speech.”²⁶ She explains that “the drafting history indicates [that] this clause was adopted with the understanding that it protected against propaganda of national, racial and religious hostility and hatred, as well as the understanding that although article 19 protected freedom of expression, it did not protect expression that incites discrimination.”²⁷ Considering the fact that the incitement provision is incorporated into the separate nondiscrimination clause (and not in a paragraph added to the freedom of expression provision), the provision may not see exclusively to limit-

²⁴ Abuse of rights provisions have been construed as hate speech prohibition or have alternatively been utilized by monitoring bodies as a special limit on freedom of expression (be it as a matter of admissibility or as a consideration on the merits of a free speech case), notably within the context of the regional European Convention on Human Rights which otherwise lacks an advocacy of hatred prohibition.

²⁵ As the UK argued, “no Government is obliged by the Bill to make use of the powers of limitation which are provided in [this proposed clause]” (E/CN.4/21, Annex B at 36 para. c).

²⁶ Farrior, “Molding the Matrix,” 14 (reiterated at p. 17: “may be interpreted as allowing restriction on hate speech”).

²⁷ *Ibid.*, 14–15.

ing free speech. In other words, one more comprehensive answer could be that Article 7, second sentence, potentially circumscribes all other substantive rights (i.e., in a manner not unlike the general limitation clauses included in Articles 29 and 30). A somewhat different reading holds that Article 7 gives further meaning (in situation where the particulars of the case so require) to the general limitation clause of Article 29.²⁸ Notwithstanding this, the fact remains that the incitement provision is formulated as a *right* rather than a limitation clause. Both the wording ('all are entitled to protection against incitement to discrimination') and the positioning within the UDHR (the drafters seem to have reserved clear-cut restriction clauses for the final Articles: 29 and 30) make that clear. Accordingly, all things considered the exact relationship between Articles 7 and 19 is best expressed by pointing out that Article 7 is not so much a special limit on Article 19, but an additional right ('the right to protection against incitement to discrimination'), a right that moreover may under circumstances have special significance and relevance for interpreting the general Article 29 restriction ('respect for the rights and freedoms of others') on Article 19.

The drafters of the UDHR left many questions unanswered. In addition to the just discussed question of what is the relationship between the indirect incitement limit of Article 7 (second sentence) and the generic limitation clause of Article 29, paragraph 2, another question that emerges is what is the relation between the concrete incitement clause of Article 7 and the general abuse of rights clause of Article 30? The drafters of the UDHR avoided all questions of implementation of the newly drafted declaration and left those questions for the immediate follow-up exercise—the drafting of the binding human rights Covenant(s). In addition to the question of how obligatory the incitement clause is, this meant that many other questions of implementation remained essentially unanswered: if legal restrictions are what is required/ permitted, what type of laws are supposed to offer "protection against incitement"? Can this only be realized through the adoption of penal laws (i.e., a criminal code provision that penalizes extreme speech) or are other type of regulations suitable? Substantively, the UDHR leaves unanswered what acts in the final analysis must be countered by the state. What type of expression constitutes incitement to discrimination and how to distinguish such forms of incitement from intolerant or extreme speech (be it insulting or defamatory, etc.) that qualifies as protected speech? What punishment may be imposed on those who commit illegal incitement?

We will resume these debates in our discussion of the next major international and legally binding extreme speech provision: Article 20 of the ICCPR.

²⁸ Morsink, *The Universal Declaration of Human Rights*, 72.

B. International Covenant on Civil and Political Rights

The ICCPR formulates a duty for each state party to the Covenant to adopt legislation prohibiting certain types of religious hate speech. Article 20(2) ICCPR provides that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”²⁹ Our question is what this norm precisely means and particularly if it is more than “just” a state obligation, i.e., are individuals legally entitled—do they “have a human right”—to protection against advocacy of religious hatred?

Until recently little activity on the part of the Human Rights Committee to scrutinize whether states actually comply with that norm could be noted. In recent Views (opinions regarding individual communications) and Concluding Observations (opinions regarding state reports),³⁰ the Committee seems to have rediscovered this legal notion. Particularly in brand new General Comment No. 34 on freedom of expression,³¹ adopted in 2011, the Committee is determined to conceptualize the prohibition of religious hatred so as to deal with extreme speech more actively and effectively—and, arguably, at the same time so as to differentiate this type of extreme speech from blasphemy/defamation of religion, which as a rule must be protected rather than countered by states.

In the meager case law revolving around both Articles 19 (freedom of expression) and 20 (extreme speech), the advantage of assessing speeches or publications in light of the hate speech prohibition is instantly clear: instead of taking *subjective* factors such as insult as a point of departure (something that the European Court of Human Rights has been known to do in some of its least convincing jurisprudence in this area),³² more *objective* factors can

²⁹ ICCPR, Art. 20(2). Article 4 CERD further contains rules on hate speech, but does not see to advocacy of *religious* hatred specifically. This section partly draws on Jeroen Temperman, “Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech,” *Brigham Young University Law Review* 3 (2011).

³⁰ See, e.g., Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Human Rights Comm., 67th Sess., para. 21, U.N. Doc. CCPR/CO/76/EGY (Nov. 28, 2002): “The Committee is deeply concerned at the State party’s failure to take action following the publication of some very violent articles against the Jews in the Egyptian press, which in fact constitute advocacy of racial and religious hatred and incitement to discrimination, hostility and violence.”

³¹ Human Rights Committee, General Comment No. 34: Article 19: Freedoms of Opinion and Expression, CCPR/C/GC/34 adopted 12 September 2011, <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

³² Cf. Jeroen Temperman, “Blasphemy, Defamation of Religions & Human Rights Law,” *Netherlands Quarterly of Human Rights* 26.4 (2008); and Jeroen Temperman, “Protection against Religious Hatred under the United Nations ICCPR and the Eu-

be scrutinized in order to judge whether a state rightly interfered with the applicants' free speech. That is to say, the centre of gravity of legal assessment becomes the actual speech (*text*: are objective elements of incitement discernible?) and even more importantly, the actual or potential reaction vis-à-vis the group or persons addressed by the speech (*context*: are there clear and imminent threats to the rights of the targeted persons as a result of the publication/speech?) instead of the reaction or potential reaction by the targeted group itself (i.e., feelings of insult). Note, however, that (national and international) judicial and academic debate as to which factor, *textual* or *contextual*, ought to be decisive in the assessment of hate speech cases, is still subject to intense debates. An elegant mixture of textual and contextual approaches was offered in the pioneering 7-prong test developed by ARTICLE 19, a leading freedom of expression NGO.³³

To illustrate, *Ross v. Canada*³⁴ concerned a teacher propagating anti-Semitic sentiments. In this case, the Committee reasoned that the teacher's right could reasonably be restricted on the basis of the rights and reputations of others, more specifically the right of the pupils to be protected from religious hatred.³⁵ Reading Article 19 of the ICCPR in conjunction with Article 20(2), the Committee reasoned that restrictions are, in principle, permitted on statements which are of a nature as to raise or strengthen hostile feelings

ropean Convention System," in Silvio Ferrari and Rinaldo Cristofoi, eds., *Law and Religion in the 21st Century: Relations between States and Religious Communities* (Farnham: Ashgate, 2010). With a few notable exceptions (e.g., *Giniewski v. France*, App. No. 64016/00, 2006-I Eur. Ct. H.R.), the Strasbourg Court often fails to distinguish between forms of criticism or insult that do and those that do not actually jeopardize public order and/or the rights and freedoms of others (notably their religious rights). See, e.g., *X. Ltd. and Y. v. United Kingdom*, App. No. 8710/79, 28 Eur. Comm'n H.R. Dec. & Rep. 77 (1982); *Otto Preminger-Institute v. Austria*, App. No. 13470/87, Ser. A No. 295-A Eur. Ct. H.R. (1994); *Wingrove v. United Kingdom*, App. No. 17419/90, 1996-V Eur. Ct. H.R. (1996), <http://www.echr.coe.int/echr/> (click "case law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number); *Murphy v. Ireland*, App. No. 44179/98, 2003-IX Eur. Ct. H.R. (2003).

³³ See ARTICLE 19, "Towards an Interpretation of Article 20 of the ICCPR: Thresholds for the Prohibition of Incitement to Hatred (Work in Progress)," a study prepared for the regional expert meeting on Article 20, organized by the Office of the High Commissioner for Human Rights, Vienna, 8–9 February 2010. The following factors ought to be taken into account in the proposed test: (1) Severity; (2) Intent; (3) Content; (4) Extent, in particular the public nature of the speech; (5) Imminence; (6) Likelihood or probability of action; and (7) Context.

³⁴ Human Rights Committee, Communication No. 736/1997, *Malcolm Ross v. Canada*, U.N. Doc. CCPR/C/70/D/736/1997 (2000), <http://www.unhchr.ch/tbs/doc.nsf/0/29712c8dde3414dc12569ad003d0316?OpenDocument>.

³⁵ *Ibid.*, para. 11.5.

vis-à-vis adherents of a certain religion.³⁶ Scrutinizing not so much the question of whether pupils or parents were hurt in their religious feelings, but rather whether or not the berated statements could objectively threaten the rights of others, the Committee established that the rights of Jewish pupils were indeed at stake.³⁷ The Committee came to that conclusion on the basis of a textual analysis of the statements and publications and in light of the actual social context in which statements were made.

In that respect two things were important to the Committee. First, the author's statements did not merely denigrate Judaism, but actually "called upon true Christians . . . to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy, and Christian beliefs and values" (i.e., an objective incitement element).³⁸ Second, the Committee was concerned about the reaction or potential reaction of persons that read the publications vis-à-vis the group or persons targeted by the publication (i.e., what is the local social context like?: is the publication of such a nature that people may indeed be incited to act upon it, thus threatening the rights of the people targeted by the publication?).³⁹ Posing this question meant that the Committee was not satisfied with the mere fact that a relevant, recognized limitation of the freedom of expression can *in abstracto* be advanced (here "the rights of others"), rather, it is essential to inquire into the necessity of the interference. In this particular case, the Human Rights Committee confirmed the existence of a "poisoned school environment,"⁴⁰ thus establishing more or less objectively the need to interfere with the teacher's publications.

As was mentioned before, in recent times the Human Rights Committee has taken up the task of elaborating further on freedom of expression (Article 19 ICCPR), and the interplay of this right with Article 20(2) on hate speech, in the form of a new General Comment (No. 34). This General Comment resolves many long-standing debates: the precise nature of state obligations, the relationship between the prohibition of hate speech and freedom of expression, and the precise meaning of some of the key terms. Additionally, it provides some guidance on the necessary safeguards that must be in place in order to combat hate speech.

First, the new General Comment makes clear that not every type of advocacy of hatred ought to be prohibited. Specifically, only the advocacy of religious⁴¹ hatred that constitutes incitement to discrimination, hostility, or

³⁶ Ibid., para. 11.6.

³⁷ Ibid.

³⁸ Ibid., para. 11.5.

³⁹ Ibid., para. 11.6.

⁴⁰ Ibid. (following earlier observations made by the Canadian Supreme Court and a domestic Board of Inquiry in paragraphs 4.6 and 4.7).

⁴¹ Note that Art. 20(2) of the ICCPR also prohibits advocacy of *national* and *racial* hatred. This account solely focuses on advocacy of *religious* hatred.

violence is to be a priori prohibited by states. Forms of advocacy that fall short of such incitement are not covered by the provisions of the Covenant. In its second and third drafts of the General Comment, the Committee had defined key terms:

- *Advocacy*: “By ‘advocacy’ is meant public forms of expression that are intended to elicit action or response.”⁴²
- *Hatred*: “By ‘hatred’ is meant intense emotions of opprobrium, enmity and detestation towards a target individual or group.”⁴³
- *Incitement*: “‘Incitement’ refers to the need for the advocacy to be likely to trigger imminent acts of discrimination, hostility or violence. . . . It would be sufficient that the incitement relate to any one of the three outcomes: discrimination, hostility or violence.”⁴⁴

In the final, adopted version, these definitions have been deleted. Although it was perhaps slightly progressive to offer such extensive definitions of the prohibition’s key terms, and although any definition provided would likely draw criticism from at least some states, altogether the deletion of these definitions is regrettable. In particular, these definitions made clearer what actually constitutes hatred. Moreover, the deletion is particularly regrettable as the definitions provided the precise extent to which *mens rea* is an element of the crime of hate speech—thus indicating a threshold for this crime and, in so doing, surrounding the prohibition with concrete safeguards against abuse at the national level. Specifically, the definitions made it clear that for speech or a publication to amount to “advocacy,” one must intend at least “to elicit action or response.”⁴⁵ For the advocacy to amount to incitement, in turn, it is necessary (under the abandoned definitions) that the speech or publication be “likely to trigger imminent acts of discrimination, hostility or violence.”⁴⁶ At the same time it is clear that not all forms of advocacy of hatred are to be prohibited, but only those instances that constitute “incitement to discrimination, hostility or violence.” It is clear, given the word “or,” that it is sufficient that the incitement relate to any one of the three outcomes.⁴⁷ It is also clear that, at a minimum, one such outcome must be intended. The word “or” is at the same time quite problematic though; for is it possible to advocate reli-

⁴² Draft General Comment No. 34, Article 19, para. 53, U.N. Doc. CCPR/C/GC/34/CRP.2 (Jan. 29, 2010); Draft General Comment No. 34, Article 19, 2nd Revised Draft, para. 53 CCPR/C/GC/34/CRP.3 (June 28, 2010) (hereafter, “Draft General Comment, June 28”).

⁴³ Draft General Comment, June 28, *supra* note 77, para. 53.

⁴⁴ *Ibid.*

⁴⁵ Draft General Comment, June 28, *supra* note 42, para. 53.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

gious hatred without minimally also inciting to “discrimination”?⁴⁸ If the relevant international benchmarks themselves are confusing, it comes perhaps as no surprise that domestic practice in this area occurs on a trial-and-error basis.⁴⁹

The new general Comment is careful on the issue of Holocaust denial. In particular, rather than considering this form of extreme speech as falling automatically within the ambit of advocacy of hatred within the meaning of Article 20(2), the Committee’s considerations are characterized by concern about “memory laws.” Specifically, the Human Rights Committee explains that:

Styles that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events.⁵⁰

This statement can be seen as a departure from earlier views.⁵¹

The General Comment also additionally explains the relationship between freedom of expression and the prohibition of hate speech:

The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.⁵²

In other words, Article 20(2) ICCPR is *lex specialis* to the extent that this is the only form of speech with respect to which an a priori response by the state is required (their prohibition by law).⁵³ At the same time it is clear that this ground for limitation is treated on par with those provided by Article 19(3) ICCPR. This additionally underscores the fact that interference with free

⁴⁸ This apparent oversight or inherent flaw has been pointed out by Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd rev. ed. (Kehl: N. P. Engel, 2005), 474–75.

⁴⁹ See the discussion of the peculiar way the Dutch legislator has opted to forbid advocacy of religious hatred, *supra* text accompanying note 19.

⁵⁰ General Comment No. 34, para. 49, containing the following reference: “So called ‘memory laws’; see communication No. 550/93, *Faurisson v. France*. See also concluding observations on Hungary (CCPR/C/HUN/CO/5) paragraph 19.”

⁵¹ *Robert Faurisson v. France*, Human Rights Committee, Communication No. 550/1993, Views of 8 November 1996, UN Doc. CCCCPR/C/58/D/550/1993 (1996).

⁵² General Comment No. 34, para. 50 (citing *Ross v. Canada*, No. 736/1997).

⁵³ See *ibid.*, para. 51.

speech on account of hate speech concerns must always be provided by a law prohibiting extreme speech. Furthermore, given the interrelation between Articles 19 and 20, such standard benchmarks as necessity and proportionality play a role in assessing interference based on hate speech regulations.

Article 20(2) ICCPR itself leaves little doubt that legislative action is necessary since advocacy or religious hatred “shall be prohibited by law.” On the other hand, a number of states upon ratification entered reservations or declarations to Article 20(2) ICCPR stating that compliance with this provision shall not, as far as these states are concerned, entail the issuance of laws prohibiting extreme speech. In its General Comment, the Human Rights Committee reiterates its own position and makes explicit that countering advocacy of religious hatred requires the adoption of laws prohibiting such extreme speech:

What distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19.⁵⁴

And it does so again where it states: “It is only with regard to the specific forms of expression indicated in article 20 that States parties *are obliged to have legal prohibitions*.”⁵⁵ This is hardly a departure from previous doctrine. General Comment No. 11, as early as 1983, provided that

For article 20 to become fully effective there ought to be a law making it clear that . . . advocacy as described therein [is] contrary to public policy and providing for an appropriate sanction in case of violation. The Committee, therefore, believes that States parties which have not yet done so should take the measures necessary to fulfil [sic] the obligations contained in article 20, and should themselves refrain from any such . . . advocacy.⁵⁶

⁵⁴ General Comment No. 34, para. 51.

⁵⁵ General Comment No. 34, para. 52 (emphasis added).

⁵⁶ Office of the UN High Commissioner for Human Rights, Human Rights Commissioner, General Comment No. 11: Article 20 (Prohibition of propaganda for war and inciting national, racial or religious hatred), HRI/GEN/1/Rev.9 (Jan. 29, 1983), reprinted in “Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies,” U.N. Doc. HRI/GEN/1/Rev.6 at 133 para. 2 (2003). The point has also been repeatedly made in the state reporting procedure in concluding observations. E.g., CCPR/CO/81/BEL (Belgium); CCPR/CO/84/SNV (Slovenia).

In the eyes of the Human Rights Committee, the flip side of this increased focus on identifying what amounts to hate speech and what acts should be prohibited and combated is the *decriminalization* of speech and publications that do not amount to advocacy of religious hatred. Concretely, this means that states are to criminalize hate speech not alongside but *instead of* religious defamation or blasphemy offenses. The General Comment takes a firm stance on this debate when it provides that “[p]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant.”⁵⁷

The Committee equally underscores that states may not abuse the prohibition of advocacy of religious hatred to punish legal criticism of religion or to stifle unpopular and unwanted debate. First and foremost, it is clear that the threshold for acts that must be prohibited is exceptionally high: only the *qualified* act of advocating religious hatred that constitutes incitement to discrimination, hostility, or violence is to be prohibited by states. Second, “it is not compatible with the Covenant for a restriction to be enshrined in traditional, religious or other such customary law.”⁵⁸ A legislative prohibition must be the result of competitive politics, so as to ensure that the result is not discriminatory (i.e., protects all religious minorities and other groups in need of protection), does not undermine free speech, and is otherwise in line with the state’s constitution and international human rights law. Finally, given the interrelation between articles 19 and 20, such standard benchmarks as necessity and proportionality must play a role in assessing interferences based on hate speech regulations.⁵⁹

Remarkably, what the new General Comment No. 34 does not indicate is whether Article 20, second paragraph, does imply besides clear state obligations in the legislative spheres, an *individual human right*, i.e., a right not to be the target of religious hatred spread by other persons. Or put slightly differently, should an individual who believes that he or she is victim of advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence be in a position to lodge a complaint about the state not combating this type of extreme speech sufficiently, either because it does not adopt the type of legislation Article 20 ICCPR envisages, or because whatever domestic legislation that corresponds to the international norm is not consistently enforced?

This omission is remarkable for three reasons. First, accepting this very possibility, hate speech norms themselves being breached by states parties and the related possibility of individual complaints about noncompliance with

⁵⁷ General Comment No. 34, para. 48.

⁵⁸ General Comment No. 34, para. 24.

⁵⁹ General Comment No. 34, paras. 50–52.

international hate speech norms, would not be unique as the Human Rights Committee's colleague, the CERD Committee, has already accepted something similar in its jurisprudence on Article 4 CERD.⁶⁰ Second, this lack of legal clarity has been pointed out in the legal doctrine time and again.⁶¹ Third, in its case law the Human Rights Committee itself has not shied away from expressly extrapolating from Article 20 ICCPR a "right to be protected from religious hatred."⁶² The next logical step, then, would have been to further construe Article 20, paragraph 2, to mean an autonomous fundamental right.

Any such development should arguably not imply competence on the part of the Human Rights Committee to substantially reassess domestic hate speech trials. Indeed, especially considering the still widely varying forms of state practice in this area, states should be left considerable discretion—within the outer boundaries being provided by Article 20 ICCPR itself and the Committee's further benchmarks—to adopt and enforce relevant legislation. What this development—declaring Article 20(2) ICCPR an autonomous, individual right—could and perhaps should entail is the more moderate competence on the part of the Committee to declare either (1) the total absence of relevant legislation; or (2) legislation that notably deviates from the formulation of Article 20(2) ICCPR; or (3) a clear refusal to implement codified hate speech laws in cases that warrant implementation, or (4) an interpretation and application of domestic hate speech bills in clear contravention of international standards, as breaches of the Covenant. Admittedly, the last two scenarios come closest to substantial reassessment of the trial. What is meant by these points, though, is somewhat different. Let us take once more the *Wilders* case as an example. In the light of the impugned expressions, it would have been a clear breach of the ICCPR had the Netherlands not even investigated the matter (having, moreover, received dozens of complaints). Relevant legislation and prosecutorial procedures and judicial venues were in place. Thus, a breach if the ICCPR in the sense of point (1) is not plausible. Ultimately, the Netherlands cannot be accused of refusing to set in motion the relevant procedures of Dutch incitement legislation; although, one may recall from the introductory section I that the prosecutor—who's hand was forced by a Court order—did his job rather reluctantly. The almost inevitable prosecutorial request for full

⁶⁰ See *L. K. v. The Netherlands*, Communication No. 4/1991, U.N. Doc. A/48/18 at 131 (1993); *The Jewish Community of Oslo et al. v. Norway*, Communication No. 30/2003, U.N. Doc. CERD/C/67/D/30/2003 (2005).

⁶¹ E.g., J. T. Möller and A. de Zayas, *United Nations Human Rights Committee Case Law* (Kehl: N. P. Engel, 2009), 377; however, Nowak, *supra* note 48, calling Article 20 an "alien element in the system of the Covenant," but seems to imply that the provision entails exclusively state obligations, not autonomous rights.

⁶² Human Rights Committee, Communication No. 736/1997, *Malcolm Ross v. Canada*, U.N. Doc CCPR/C/70/D/736/1997 para. 11.5 (2000), <http://www.unhchr.ch/tbs/doc.nsf/0/29712c8ddea3414dc12569ad003d0316?Opendocument>.

acquittal meant that the case was never really a case. However, naturally, a prosecutorial dismissal or a court acquittal is one possible outcome of domestic hate speech investigation procedures. At this point in time, when there is anything but a fully crystallized and universal state practice in this area, probably what matters most to an international monitoring body is that investigations were indeed carried out. Accordingly, a breach of point (3) seems only plausible if it could be established that the prosecutor and the Amsterdam District Court were for instance unduly one-sided in accepting arguments in favor of Wilders's innocence whilst rejecting outright or arbitrarily any arguments advanced on behalf of the alleged victims in this case. In the future, when more international jurisprudence, further benchmarks and guidance by the Human Rights Committee, and more uniform domestic state practice emerges, the prosecutorial and judicial levels of discretion could become more circumscribed. This means that the way the Dutch authorities handled the *Wilders* case could plausibly only be construed as a breach of the ICCPR if it can be substantiated that the specific forms of interpretation and application of Dutch hate speech laws was in *clear* contravention of this Covenant. This is precisely what a number of alleged victims have claimed before the Human Rights Committee in Geneva.

IV. The *Wilders* Case Continued?

Most of the questions posed in this essay will be answered sometime soon by the Human Rights Committee itself. A final twist to the *Wilders* case is that some of the alleged victims of hate speech have brought a case against the Netherlands, indeed: for *not* convicting Wilders, that is, for allegedly not protecting persons enough against incitement to discrimination, hostility and violence.⁶³

It is certainly logical that these stakeholders bring the case to Geneva and not to Strasbourg. The European Convention on Human Rights does not contain a hate speech prohibition—there is nothing much in that human rights treaty that alleged hate speech victims can complain about. Also note that the equality provision codified by the ECHR is not an autonomous right to equality, but an accessory right of nondiscrimination, i.e., a provision always to be read in conjunction with one or more substantive human rights enshrined in the Convention.⁶⁴ The only relevant benchmarks in the Convention (i.e., Article 17 on abuse of rights) or in the jurisprudence (i.e.,

⁶³ *M. R., A. B. S. and N. A v. The Netherlands*, CCPR communication dated 15 November 2011, <http://www.bohler.eu/nl/nieuws-overzicht/klacht-tegen-vrijspreek-wilders-ingediend/>.

⁶⁴ Reference is made to the equality principle of Article 14 ECHR. Note that Protocol No. 12 (ratified by the Netherlands) does in Article 1 contain a general prohibition

judgments that take Article 10 and Article 17 to imply hate speech restrictions on freedom of expression) on the issue of hate speech could possibly have been seized upon by the Strasbourg Court to deny Wilders standing/dismiss his complaint *had he lost his domestic case*. One may recall the somewhat comparable cases of European politicians being fined for hate speech offences and not being successful in Strasbourg, such as *Norwood v. UK*, *Le Pen v. France*, and *Féret v. Belgium*.⁶⁵

As the European Convention does not speak of a prohibition of hate speech, let alone any *right* to be safeguarded against such speech, the Court, too, tends to refrain from “rights” language in this area in its case law. That is, the Court does not use concepts such as “a right to be free from incitement” or a “right to be protected against hate speech,” etc., when pronouncing on relevant cases. Indeed, most “hate speech” cases brought to the Court have been brought by alleged *inciters*. That is, persons (politicians, journalists, artists, etc.) that have been charged with hate speech offences under national law and are seeking to challenge whatever interference was imposed on them (fines, imprisonment, job dismissals, dissolutions of organizations, etc.). Alleged *victims* of hate speech offences have not yet brought very many complaints to Strasbourg, perhaps for the reasons just indicated. Europeans do not yet complain before this Court about inadequate enforcement of hate speech laws—the reason being that a superficial reading of the Convention shows that there is not much in this treaty hate speech victims could complain about.

However, positive obligations under certain rights, notably the right to life, or the right to private life, could very well offer a point of departure for relevant claims. From recent European human rights litigation we can infer now that alleged hate speech victims may have standing before the ECtHR, despite lacking a hate speech prohibition and a right to be protected against incitement. The case of *Aksu v. Turkey* shows that alleged hate speech victims may very well attempt to persuade the Strasbourg court to determine a violation of Article 8 on private life.⁶⁶ Although in *Aksu* the European Court did *not* find a violation of this right, it did look into the complaint which regarded a study about Roma and two dictionaries. These materials were alleged, by Mr. Aksu, to be negatively stereotyping Roma people. The case dealt with ste-

of discrimination, but it is not clear of how much use that provision would be to a complaint that a member state has not enacted or enforced hate speech legislation.

⁶⁵ *Mark Anthony Norwood v. The United Kingdom*, Application No. 23131/03, decision of 16 November 2004; *Le Pen v. France*, Application No. 18788/09, decision of 7 May 2010; *Féret v. Belgium*, Application no. 15615/07, 16 July 2009. See also, *Glimmerveen and Hagenbeek v. The Netherlands*, Application nos. 8348/78 and 8406/78, Commission decision of 11 October 1979.

⁶⁶ *Aksu v. Turkey*, Application nos. 4149/04 and 41029/04, Grand Chamber judgment of 15 March 2012.

reotyping minorities, not with “incitement” per se, yet the fact that the Court entertained the case means that standing in an incitement case is no longer unlikely.

Be that as it may, two Dutch lawyers of the international law-oriented Dutch firm Böhler Advocaten brought the case against the Netherlands on behalf of three anonymous applicants, M. R., A. B. S. and N. A. Perhaps for the reasons just indicated, they decided to turn to the UN Human Rights Committee, not the European Court of Human Rights. The three applicants are Dutch citizens of Moroccan descent and all claim to have personally experienced negative impact triggered by Wilders’s statements, ranging from more general feelings of increasingly being threatened and marginalized to very concrete forms of violent hate crimes.⁶⁷ Besides other claims that are beyond the scope of this chapter, applicants claim a breach of Article 20 (taken in conjunction with the equality principle of Article 26 and minority right codified by Article 27).⁶⁸ In respect to this complaint, the applicants consider that while Article 20 ICCPR is formulated “in terms of obligations of the state rather than in rights of individuals, this does not imply that these are matters to be left to the internal jurisdiction of state parties and as such immune from review under the individual communication procedure.”⁶⁹

Thus, the *M. R., A. B. S. and N. A v. The Netherlands* case is among the first cases to be principally premised on an alleged breach of Article 20(2) ICCPR.⁷⁰ The strengths of the Communication lie in the following facts: the applicants make it very clear that they complain not because they feel insulted (after all, there does not exist under international law a right not to be insulted); they have lodged their complaint because they feel threatened—a real threat that the Dutch state does not sufficiently seek to combat.⁷¹ Further, the applicants do not claim that the Netherlands breach the Covenant merely because Wilders was acquitted; what is claimed is more specifically that (1) the Dutch

⁶⁷ *M. R., A. B. S. and N. A v. The Netherlands* Communication, see pp. 3–4 for the background of the complainants and their experiences.

⁶⁸ Other complaints invoke Article 2 and Article 14 of the ICCPR.

⁶⁹ *Ibid.*, 2.

⁷⁰ Article 20(2) ICCPR was for also expressly invoked by an applicant in *Maria Vasilaris et al. v. Greece*, U.N. Doc. CCPR/C/95/D/1570/2007, Communication no. 1570/2007, Views of 19 March 2009. This case, however, revolved around incitement against Roma, not religious incitement. Mention must also be made of *Kasem Said Ahmad and Asmaa Abdol-Hamid v. Denmark*, Communication No. 1487/2006, decision on admissibility of 1 April 2008. Article 20(2) was invoked against Denmark for refusing to prosecute the creators of the infamous ‘Danish Cartoons’ mocking, among other things, Muhammed. However, the applicants had not exhausted domestic remedies, thus offering the Human Rights Committee an easy way out of having to face the question as to whether Article 20 can indeed be invoked by applicants.

⁷¹ *Ibid.*, 5.

judge did not interpret advocacy of hatred in accordance with international standards; and (2) that there was very solid evidence that successful advocacy of religious hatred *constituting discrimination, hostility or violence* was available but not adequately valued by the Dutch judiciary. The applicants argue that the Dutch judge failed to appreciate the *context* enough and concentrated overly on the *content* of the impugned statements. The relevant statements were, moreover, scrutinized in too much isolation rather than in conjunction. The Dutch court ought to have assessed better the *cumulative effect* of all the statements made on Dutch society.⁷² The applicants present ample data (on discrimination and relevant hate crimes) endeavoring to link up what they experienced as *systematic* incitement, to an objectively discernible *poisoned atmosphere*.⁷³

It will be very interesting to see how the Human Rights Committee rules. Of course, the easy way out would be to declare the case inadmissible (for failure to complain about a substantive right; or by declaring itself incompetent *ratione materiae*). Yet, the CERD Committee has already set a different precedent in that respect; there are no formalistic reasons why the Human Rights Committee could not do the same.⁷⁴ Also, the recent rediscovery of Article 20—see the final paragraphs of the extensive General Comment No. 34—could be taken to mean that the Human Rights Committee means business in the area of combating advocacy of hatred that constitutes incitement to discrimination, hostility or violence.

All in all, we may observe the emergence not so much of a right to be free from hatred, but a *right to be free from qualified forms of advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence*. That seems to be the most sensible way forward. If we accept that the most extreme forms—and only the most extreme forms—of hate speech deserve *a priori* prohibitions, then it would stand to reason, too, that people have access to justice in the event that states fail or refuse to combat those same instances of advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence. However, granting people standing to complain about every time they “feel hated”—drawing an analogy with abusive blasphemy and defamation laws seems very apt—would open up the floodgates to all types of unnecessary and undesirable hatred and insult litigation. International law does not prohibit all forms of hate speech, but only the most extreme forms, namely, forms of advocacy of (religious)⁷⁵ hatred that constitutes incitement to discrimination, hostility or violence. It is the *qualified act* of advocacy of hatred + incitement that needs to be legally banned. The corollary of this

⁷² Ibid., 9–10.

⁷³ Ibid., 20–22.

⁷⁴ See note 60, *supra*.

⁷⁵ Note: and “racial,” and “national” hatred—topics that are beyond the scope of this chapter.

would imply that states may not expressly ban hate speech per se, as that would outlaw “moderate” forms of hate speech, meaning forms of advocacy of hatred that appear to *exclude* a direct objective of incitement. The denial of historical atrocities could be an example, depending on the exact particulars of the expressed denial obviously. This debate brings us back again, though, to the very problematic word “or” in the hate speech prohibition of Article 20(2) ICCPR: is it possible to advocate religious hatred without minimally also inciting to “discrimination”? If the answer is negative, then indeed *all* forms of hate speech are to be banned after all (both extreme and more “moderate” forms). Whichever precise way the law is formulated, it is ultimately judges that implement hate speech prohibitions: the conundrum of how best to formulate the provision is moderated by the fact that judges in their judicial practice could (should) separate the wheat from the chaff by knowing when *context* ought to trump *text*. Thus, especially in those cases where it is not sufficiently clear from the text that we are in fact dealing with *qualified* hate speech (i.e., including incitement to discrimination/hostility/violence), judges should chiefly consider context and seek answers to the question: what harm could the berated statement do in the present sociopolitical reality? Many alleged hate speech cases will not meet the threshold in the final analysis—which is only to be expected with a provision that sees to the most extreme forms of extreme speech. In some cases of more systematic hate campaigns, although the text(s) concerned ostensibly and opportunistically fall short of overt incitement, it is the sociopolitical context that could tip the balance.

List of Contributors

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RHONDA BREIT, LLB, PhD, has been lecturing and researching in the field of media law and ethics for the past 17 years. Her research focuses on the nexus between professional communication (journalism and public relations), law and ethics, where she draws on her personal experience as a lawyer and journalist. She joined the School of Journalism and Communication at the University of Queensland, Brisbane, Australia, in 2002. During that time, she has held the positions of Chair of Teaching & Learning, Deputy Head of School and Head of School. In December 2014, she will join the Aga Khan University Graduate School of Media and Communication in Nairobi, Kenya, as Associate Dean Academic, where she will spearhead the development of a MA in Multi-Media Journalism.

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Helen Darbshire has provided expertise to a wide range of non-governmental and inter-governmental organisations, including UNESCO, the Council of Europe, the OSCE, and the World Bank. She is a founder of the

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In 2007, the staged version of his novel, *Searchers*, won awards for best alternative play and best independent play in Hungary. A slam poetry performer in English and in Hungarian since 2010, when he initiated and convened an anti-racist/pro-diversity slam poetry event with internet streaming between Budapest and New York. In 2013 and 2014, he produced with his CEU courses on responses to "hate speech" the *"Hate Speech" Monologues*. Since July 2013, he voluntarily hosts a bi-weekly radio show on responses to "hate speech" on Tilos Rádió (Forbidden Radio). Molnár accepted in 1989 on behalf of Fidesz the very prestigious Rafto Prize for human rights and as it is posted about the Rafto Laureates on the website of the Rafto Foundation: "For the Rafto Foundation, Péter Molnár represents the liberal spirit of the organization that was awarded in 1989."

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— **Nadine Strossen**

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